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THE

HISTORY AND PRINCIPLES

OF THE

CIVIL LAW OF ROME

AN AID TO THE

STUDY OF SCIENTIFIC AND COMPARATIVE JURISPRUDENCE

BY

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1883

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TO

SIR HENRY SUMNER MAINE,

WHOSE HISTORICAL TREATISES AND CONSISTENT ADVOCACY OF

AN HISTORICAL METHOD IN

LEGAL STUDIES HAVE RESCUED THE LAWS OF ROME

FROM THE NEGLECT INTO WHICH THEY HAD FALLEN IN ENGLAND,

AND ESTABLISHED FOR EVER THEIR ESSENTIAL RELATION

TO EVERY SYSTEM OF LAW

HAVING AN EUROPEAN PARENTAGE.

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PREFACE.

THE present is a critical moment in the history of law and of formal legislation. The common law of England, the customary law of every European State, and the laws of Rome and Constantinople, are being brought face to face with unprecedented social needs and a call for popular Codes. In India and in Egypt the elaborate system of Mohammedan law is being confronted with its long-ignored parent, the law of the Eastern Empire, and, under the influence of Western legislation, is crystallizing into new forms. The law of nations, public and private, is being more and more assiduously translated into the common language of written law. For this task, the terminology, the classification, and the logical analogies resorted to are invariably those of the law of Rome.

I have placed before the reader of this treatise, in the most compendious form I could adopt, the whole body of Roman law, both as it presents itself at its most characteristic epoch, the age of Justinian, and as it has been formally developed from the

era of the XII. Tables to that of the Code Napoléon and of its numerous family of Codes. The period covered is more than two thousand years; and yet, so far from the essential principles of the law becoming obsolete, they are found marvellously plastic to new commercial and social conditions, and seem likely to ensure for themselves a future greater and longer than their past.

When forced to select among rival illustrative topics, I have brought into relief all that has specially affected the primary elements of European civilization, such as religion, morality, and commerce. In this connection I may refer for fuller historical details on some parts of the subject to my article, less relevant here, on "Law," in Smith's "Dictionary of Christian Antiquities."

It has not been easy to meet at one and the same time the requirements of the professional student and of the general reader, but I have kept both in view throughout.

My experience when lecturing on Roman law, first as "tutor" to the Inner Temple, and then as Professor to the Inns of Court, was perpetually bringing home to me the need of some such comprehensive text-book as the present, originally composed in English (that is, not a translation from the French or German), and observing a due proportion between the logical and the historical aspects of the subject.

It is almost superfluous to notice that the theologian, the general historian, and the speculative jurist are seen on all sides to be resorting to the facts of Roman law and administration for the support of their theories or the confutation of their opponents.

I have preferred the term "Civil" to "Roman" in describing the system of which I treat, because for all modern purposes it is only the Roman law, as modified and transformed by Justinian for the use of his non-Roman provinces, with all their medley populations and governments, which has descended to the modern world. All that was nearly obsolete in the time of Gaius—that is, the middle of the second Christian century—is little more than matter of curious antiquarian research now. Most of that which lived, or was called to life, in Justinian's reign —that is, in the first half of the sixth century—is, under one form or another, living at this hour.

For some years back I had been collecting books new and old, bearing on the fortunes of the Civil law, and especially on its relations to customary law in France and England. Nearly all these books were burnt in the fire of Alexandria, in July, 1882, and I have been, consequently, prevented from verifying references in the proof-sheets, and giving particulars as to the number and dates of editions I have used. The marginal references generally are only designed for the general direction of students' reading, and not for the proof of assertions in the

text. To supply this proof to every sentence would have overloaded the margin beyond all proportion.

I need not say I have made the freest use of the latest German, French, Belgian, and Dutch text-books, and especially of Mr. Long's articles in Smith's "Dictionary of Greek and Roman Antiquities," which, with Professor Hunter's exhaustive treatise on "Roman Law," are the best purely English authorities on the subject. In matter of classification I have usually preferred the Continental to the English methods, and the German to the French.

S. A.

ALEXANDRIA, 1883.

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HISTORY AND PRINCIPLES OF THE CIVIL LAW.

INTRODUCTION.

If the era of Augustus has appeared to some signally fitted for the manifestation of a religion for the civilized world, a law for that world was consolidated and republished by Justinian in times scarcely less suitable for its reception and spread. The Eastern empire still retained its unbroken unity and that concentrated system of administration which had been impressed upon it by Diocletian and Constantine; while the Western empire, though shattered and dislocated, was still disciplined by the Theodosian code embodied in the barbarian legislation, and so was retained within those grooves of the older Roman law from which its progeny, the States of Europe, would never depart. It was only for a short period, indeed, that the old unity of the East and West was galvanized into life by Justinian; but the period was long enough to admit of the promulgation of the Digest, the Institutes, the Code, and the Novells throughout Italy,—a soil kept receptive of purely Roman influences by the enlightened policy of Theodoric and Cassiodorus.

It was not, however, only the continuing imperial unity and administrative inter-dependence of the parts of the world in which Justinian's laws were published that aided their rapid diffusion, and that made them take so deep and so lasting a root. Since the days of Gaius and the brilliant line of jurists in the second century, and even since

the time of Theodosius II. in the fifth, the quality of the law itself had undergone radical changes, which peculiarly fitted it for universal diffusion and easy reception. It had cast off nearly all that was exclusively and narrowly Roman, and had acquired the cosmopolitan lineaments due only to logical and common political needs. It was becoming, in a higher sense than in the early days of the Republic, a true *jus civile* or "civil law," adapted to the world just in proportion to the degree in which that world grew civilized.

The old learning relating to the distinction between Roman, Italian, and foreigner; between freedman of one order or of another and citizen; between persons married according to different formalities; had dropped away. The old and long-cherished ceremonies, of peculiarly Roman birth, of *mancipatio*, the *sacramentum*, *vindicatio*, the legal *actio*, and even the *interdictum*, and the more technical parts of the formalities of the *stipulatio*, were remembered only in antiquarian literature and in allusions in the registered opinions of the older jurists. The laws of inheritance, of succession, and of procedure were completely remodelled from their foundation, chiefly by Justinian himself. The more enlightened doctrines,—capable still indeed of indefinite improvement,—relating to slavery and manumission, had introduced chapters wholly new into the legal system. The organization of the Christian Church had been laid under tribute for the purposes of legal administration; and while one class of laws invites or demands the co-operation of the bishops and clergy and the use of sacred edifices for the more effectual execution of the laws, another class relates to the disabilities, privileges, or shortcomings of every class of ecclesiastical ministers.

It is thus clear, from even this summary survey, that by Justinian's time, and quite apart from the extraordinary influence due to his own work of expurgation and compilation, the law of the empire had been gradually amended and transmuted in such a way as well to fit it for a new and more extended enterprise.

Then, again, in Justinian's time, the Roman language of law, though debased—as is clearly shown by comparing the

terms of any passage of Gaius' Institutes with the terms of the amending passage in Justinian's Institutes—was still equal to its purpose, and was intelligible throughout the bulk of the populations affected by the law. The intensely centralized administration and the current system of judicial procedure and appeals tended to keep the Latin tongue, if not everywhere a vulgar dialect, at all events a necessary accomplishment for all aspirants to office.

At the same time the Greek language, which, in Constantinople and all the chief ports of Asia Minor, in Greece itself, in Syria, and in Alexandria, was the language of the market-place, the exchange, and, as it would seem, the polite coterie, afforded a secondary vehicle for the diffusion of Justinian's laws. It is sufficient to conclude these remarks by noticing that of the two most authoritative texts of his Novells (that is, his numerous constitutions published after his main compilations were completed), one is in Latin and the other in Greek.

It may be observed, by the way, that the interval of a century between the legislation and victories of Justinian and the legislation and victories of the Caliphs was just sufficient to enable the law as settled by Justinian to take root in the Eastern provinces, afterwards subjugated by the Arabs, and to evolve, through the schools of law and the ubiquitous system of administration, a type on which the Arab legislation was, as will be shown on a later page, manifestly founded. The law was thus prepared to be co-extensive with the reach of Mahommedan, as it already was with that of Christian, influence.

This consideration of the peculiar circumstances of Roman law at the era of Justinian at once demonstrates the impropriety of treating the subject without regard to the period of time concerned. The history of Roman law from the XII. Tables to the legislation of Justinian covers a period of nearly a thousand years. The progress of the law throughout all this time can be traced step by step, although the authorities for the state of the law are much more numerous and copious at one time than at another.

Thus, there are preserved in the writings of the

Roman historians, and on the older monuments, clear indications of the state and working of the law in the early days of the republic and also at every chief epoch in the development of its history, such as those of the several Secessions of the Plebs, of the Punic wars, of the reforms of the Gracchi, and of the revolutions of Marius, Sulla, Pompey, and Cæsar. The law at the close of the republic is repeatedly alluded to in Cicero's speeches, his essays, and his letters. The writers of the early empire, such as Tacitus, Suetonius, Plutarch, Aulus-Gellius, and others less well known, give abundant testimony to the state of the law at the beginning of the empire and up to the times of the writings of the great jurists of the Antonine period.

From this era the description of the progress of the law is exact and continuous. The writings which survive of Gaius, Ulpian, and Paul, at the end of the second and the beginning of the third century, throw a clear light on the law of their day. The Gregorian and Hermogenian codes mark the progress made a century further on. The Theodosian code, the Vatican fragments, and other invaluable relics carry the history on to the middle of the fifth century. During all this period, beginning with the latter days of the republic, inscriptions, which are now being discovered in such plenty, illustrate or reveal the state of the law to which they refer, especially as it operated in the provinces. The so-called "Barbarian codes," and the legislation and codification of Justinian in the first part of the sixth century, further mark an epoch of the utmost significance in the evolution of the law; but, by the very nature of the extracts embodied in Justinian's Digest and the continuity of the enactments collected in his Code, a full and bright light is thrown back on the state of the law as it was during a long series of preceding epochs.

Thus nothing could be more misleading or false than to speak of "Roman law," as if the term represented an abiding entity knowing no change. The history of Roman law is, indeed, the history—political, social, and moral—of the Roman people; and therefore it is not less inopportune to speak of the Roman constitution or the extent of the

Roman territory as identical in the times of the Gracchi and in those of Marcus Aurelius, than to handle as one system the law as it was in the undivided empire of the days of Gaius and the law as it was three centuries later in the eastern empire of the days of Justinian.

The attempt to record the history of the substance of Roman law apart from the whole history of the government and the people, though often made, is an impossible and almost a frivolous one. What can be made of the repeated agrarian laws, the criminal legislation of Sulla, the Julian laws, the laws in prevention of celibacy, and the rest of the Augustan reforms, apart from all reference to current social facts, wants, and conditions?

The effort to isolate legal facts from all other facts is thus doomed to disappointment, as it is the sure avenue to an untruthful representation of facts. What can be done, and what ought to be done, is to demonstrate the steps of a purely technical sort by which the various kinds of written and unwritten law actually came into being. This narrative of the formation of law can be to some extent isolated from the rest of the history, though even then not without perilous liability to error. The student need not be misled, provided he is aware of the inherent defects of the method of separate treatment and keeps on his guard against them. On the other hand, without some account of the historical evolution of law from the beginning, it is almost impossible to understand the ideas, institutions, and terms, which belong to its final stages.

In presenting a system of law at a special epoch, when that system is imbedded, like the Roman, in statutes and case-law, the question at once presents itself as to how far the leading principles and rules can, for the sake of brevity and of provisional study, be separated from the detailed application of the law, as given in reported decisions. The choice must be a matter of discretion, and in travelling over so vast a surface of law as that of the "Corpus Juris" it cannot be supposed that any two persons would draw the line in exactly the same way. The

"Corpus Juris" itself is so voluminous and, to the superficial eye, so destitute of systematic arrangement, that a guide may well be welcomed. This task of guidance has too often been evaded, especially in England, by simply republishing the superficial sketch contained in Justinian's Institutes, which, though in its day and now (for different reasons) a precious monument of the law, was, in Justinian's own scheme of legal studies for his universities, treated as wholly insufficient, apart from the study of the Digest, even for students in the first of their five years' course.

The object of the ensuing account of the law is to give an exact and comprehensive exhibition of all the legal rules actually in force in Justinian's time, for the use of those who have no opportunity nor desire to study their minute applications; and at the same time to afford a trustworthy guide to those who propose to study the "Corpus Juris," or parts of it, exhaustively.

The purposes which students may propose to themselves in studying Roman law, apart from the compulsion or strong encouragement of educational institutions, are so various that it is difficult to anticipate them all. But among these purposes certainly that of comprehending, through an indispensable medium, the notions, language, and arrangement of all European codes, of international law, and even of ecclesiastical law in England, is no unworthy one.

There have been two special mechanical difficulties in preparing this treatise. One has been that of translating technical law terms; the other has been that of appending notes of the authorities for statements contained in the text.

A choice had to be made whether to translate a technical Latin law term by the corresponding English law term; to make (where possible) exclusive use of colloquial English terms; to modify the Latin term conformably to analogy, as in such words as *mandate, inofficious testament, pacts;* or whether not to translate the Latin term at all, but to reproduce it simply in italics. The best course seemed to be to use, where possible, approximate English law

terms, or well recognized technical terms when they are not misleading, and are so far in common use as to be intelligible to the ordinary English reader. Where there is danger of misapprehension, special precautions are taken to guard the interpretation.

As to references generally, it would simply have crowded the pages to repletion to have provided all the references to the "Corpus Juris" on some passage or other of which every sentence in the expository portion of this treatise is based. The preferable course has seemed to be only to add a reference when it is especially desirable for the reader to study the whole passage in the original, or when some statement is made which is so unexpected as to seem to need special justification. The urgent need of an English translation of the Digest to open out to students and legal practitioners belonging to English speaking populations the enormous body of matchless case-law and deductive logic contained in the Digest is still unsatisfied. For access to these fountains of legal knowledge a special training in the Law Latin of a particular period ought not longer to be an indispensable requisite. The like need has long been satisfactorily provided for in France and in Germany.

PART I.

THE HISTORY OF THE FORMATION OF ROMAN LAW UP TO THE DEATH OF JUSTINIAN, A.D. 565.

In spite of the fact that Justinian did his utmost to digest and codify every portion of the law existing in his time, whether unwritten or written in the unsystematic form of prevalent text-books, isolated statutes or partial statutes, it is none the less impossible to comprehend the whole of the law, as finally republished, without reverting to the history of the several distinct elements out of which it had grown.

Justinian's assistants in his great work seem themselves to have been fully conscious of this, inasmuch as in the Digest they preserved on all occasions a mention of the authorities and ultimate sources from which the rules of law were, on each occasion, extracted, however much they mutilated them, broke them into fragments, and cut them short. An anomaly was, indeed, thereby created, which still perplexes the student of Justinian's laws.

In the course of recurring to the works of the older writers, who commented upon the law as it was in their day, —that is, at a date usually at least three hundred years earlier than the time of the composition of the Digest,— many institutions, customs, practices in procedure, and rules of law are alluded to as if they were in full force. In Justinian's day, and especially as his own legislation progressed by force of the very impulse which originated the Digest itself, many or most of these had either become obsolete, were entirely transformed by time and later legis-

lation, or had been positively annulled. This is the case, for instance, with all the numerous rules of practice, relating to the several sorts of interdicts contained in the forty-third book of the Digest, and mostly extracted from works, in the shape of commentaries by Ulpian and Paul, written in the beginning of the third century. In Justinian's time,—as will be seen hereafter in the historical review contained in the chapter on Procedure,—the Prætor no longer existed as the chief judicial officer, and the process of issuing an interdict had given place to a merely general power of peremptory orders of all sorts, which every judge possessed for the purpose of facilitating the administration of justice. Nevertheless, it was eminently desirable, in the interests of uniform law throughout the empire, and of public order, that the exercise of this power of peremptory command should, as far as possible, be regulated by reference to intelligible and long recognized principles, such as even the emperor himself professed to defer to when intervening in the administration of justice. Such principles could be found imbedded in the older law and in rules of practice as explained and applied by the best writers in the best days; and, if they were found implicated with institutions no longer existing, they could easily be disentangled, and no real danger of confusion was hazarded.

The same kind of observations apply to the frequent mention of the XII. Tables, and of the innumerable comments upon them and upon the Prætor's Edict. It was scarcely supposed that, at Constantinople in the sixth century, the broken and oracular fragments of the primitive republican code had still direct force as law, or could be cited as still binding, in an argument before a court of justice; nor could even the Prætor's Edict, as finally settled and closed in Diocletian's reign, be still held to occupy anything like its ancient place. But in the juristical comments, both on the XII. Tables and on the Edict, were contained principles of the broadest character and highest importance, which were far too deeply infused into the spirit and essence of the whole Roman system of law—even as reconstructed in Justinian's day and by him—

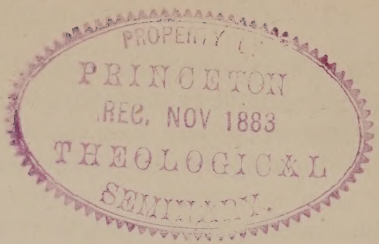
to be neglected, and of which the treatises of the older jurists—bound up, as the language of them often is, with law and customs almost forgotten—were the best or only record.

It may indeed be a matter for difference of opinion as to whether Tribonian and his coadjutors took exactly the right course in turning their enormous mass of materials to account in the special way they did. It may be objected that they have preserved too much of what was out of use, and would have acted more wisely if they had saved the time and labour of themselves and their readers, by simply expressing in the briefest language and in a systematically arranged series of terse propositions, the rules of law which were actually in force. All recollection of divided opinions, past perplexities, and settled or unsettled controversies, might thus have been prevented.

The diligent readers of Savigny's writings will not sympathize much with this class of objections. They will rather object that too little of the older writers and of obsolete law has been preserved, than too much. They will feel a secret longing to have some at least of the complete text of the old writers preserved immaculate and continuous, without the constant interpolations of curt extracts from all sorts of quarters. Nevertheless, they will willingly acquiesce in those genuinely historical principles which dictated the method of the Digest. It was true that the dominating influence of the XII. Tables, the ancient *jus civile*, the Prætor's Edict, and the republican *leges plebiscita* and *senatus consulta*, could neither be eradicated nor superseded by any number of imperial *constitutiones*. The older law might be purified and luminously transfigured, but it was too closely assimilated with all that was characteristic in the character of the Roman people to be annihilated or radically reformed. Nor was there any thought of such a reform. It was Justinian's wish, in spite of his own legislative irritability and mutability, that the law should be merely ascertained, settled, and put out of the reach of further alteration. Thus it would be a hopeless task to try to master the state of the law in Justinian's day without first travelling over the steps by which it had, in

the course of some thousand years, reached a condition of maturity, which enabled it to divest itself of most of what was narrowly and exclusively Roman, and to become a new source of *jus civile* for the civilized world in East and West.

There is one insuperable difficulty in presenting at one view the historical elements of Roman law, though it is by no means peculiar to that law. It is that written and unwritten laws, ancient codes, and occasional statutes, or rather the mechanism of written legislation, have all to be exhibited successively and separately from each other. But, in fact, most of these sources of law were, in different degrees of strength from epoch to epoch, all in force at one and the same time, and largely qualified the influence of each other. The Prætor's Edict presupposed the *jus civile*, and possibly followed to some extent the order of ideas, if not of paragraphs, of the XII. Tables. The place of statute legislation can only be understood by having a clear view of the gaps it came to fill in and of the state of society on behalf of which it was called for, while the imperial legislation and codification presupposes a full recognition of all the ancient modes of law-making at once. It is, however, a necessity which is not peculiar to this subject to take the several topics in order, and, on the whole, chronological order, where it is to be found, suggests the best and most natural arrangement to follow. No harm will be done if the student only bears in mind that many of the chief sources of Roman law were simultaneous in their operation, and largely qualified the character and influence of each other.



CHAPTER I.

THE XII. TABLES

IT has been a worthy object of competition among recent eminent commentators on Roman law to reconstruct the order of the surviving fragments of the text, if not the text itself, of the earliest monument of Roman law,—the XII. Tables. The fragments of the text are scattered up and down the works of Cicero, of the Roman historians, and of such desultory antiquarian writers as Aulus Gellius. They abound in the Institutes and Digest of Justinian, and are freely cited in the Institutes of Gaius and in the other valuable relics which survive of the great race of jurists who were contemporaries with the Antonines. Though some hints as to the original sequence of the fragments may be gathered from the order observed in the passages commenting upon those which appear in the Digest, and from what is known of the order of the Prætor's "Perpetual Edict," yet, after all the ingenious labour which such writers as Heineccius, Gothofred, and Dirksen * have expended on the task of reconstruction, the form of the XII. Tables, as now appearing in the ordinary text-books is, in a high degree, conjectural. Nevertheless, the mere collection into a compact form of all the known component elements of the Tables is in itself a work of the highest usefulness.

Circiter A.D. 117–180.

The history of the XII. Tables is sometimes cited in order to draw attention to the instance it presents of a sort of premature codification occurring at an early stage of national life, and

Maine's Ancient Law, ch. i.

* See for an account of the "Zwölfttafelliteratur," Puchta's Institutionen, vol. i. § 59.

thereupon to base a generalization as to the normal fortunes of early law. The truth is that, though the XII. Tables do undoubtedly present the phenomenon, not without a parallel elsewhere, of an early popular resistance to a monopoly of legal knowledge on the part of a privileged class, yet the lesson to be learnt from an attentive study of the fragments of the Tables is in favour of the superior tenacity and the richness of unwritten or customary law as compared with any form of written law.

The paragraphs, as they stand, are little more than brief legal maxims or mementos of settled legal principles, which must have owed all their life, and even their meaning, to a quantity of special notions widely diffused abroad, as well as to an infinity of detailed usages, of which no account whatever is contained in the words of the law itself. These usages and notions underwent constant and progressive change, and the import of the almost consecrated maxim was silently and correspondently changed likewise; but the words of the maxim were never altered, and the only result of invasions of the older law brought about by direct legislation or by the interposition of the Prætor was that the maxim became disused or obsolete. This seems already to have become the case in Cicero's time,* though even at a far later date a sentence of the tables is still occasionally quoted with the sort of deferential respect now paid in England to a few words in Magna Charta.

Thus the history of the XII. Tables exhibits, first, the fullness and richness of the customary law, which, independently of legislation, had grown up in Rome before the middle of the fourth century of her existence; secondly, the firm hold retained by this customary law on the habits and sentiments of the people all through the time of the republic and well into the days of the empire; and, thirdly, the service which a brief and legibly compressed form of written law may render to the unwritten mass of the law in maintaining its integrity and directing its development.

* See the antiquarian aspects of the XII. Tables, described with almost superstitious fondness, in Cic. de Orat., lib. i. xliii., xliv.

It has been observed that the XII. Tables exhibit, on the face of them, that early stage of law in which sins, crimes, and civil injuries are as yet imperfectly, if at all, distinguished one from another. It may be doubted whether that early stage had not been passed before the XII. Tables were composed, inasmuch as the rules regulating burials and the uncontrolled exhibition of grief on the occasion of them might be proper matters of purely police cognizance in certain conditions of society; and the accurate distinction between crimes and civil injuries is only made in the most mature era of a legal system.

But, apart from the historical light which the substance of the XII. Tables sheds on the manners of the people at the time, it is important to notice that, in fact, all the leading departments of a complete legal system found their place in them. The constitution of the family, and the institution of guardianship; the security of property in its different kinds, including "servitudes;" the transfer of property, and the succession to property, testamentary and intestate; the protection of contracts; the recognition of rights to reputation; the punishment of fraud and theft; and the detailed methods of administering justice; these are a series of topics with which the XII. Tables were almost exclusively concerned, and on each of which they laid down a clear, broad, and guiding principle.

Thus it is no mere antiquarian sentiment which makes the XII. Tables the starting-point of the history of Roman law. They not only contain the germ of all the later law, but for centuries they supplied the leading principles to which all doubtful questions were referred. True it is that many of the institutions and rules sanctioned by the Tables soon died out, and some were probably on the verge of expiring at the very time they were refreshed with a spurious vitality. But in a growing society law is always more vegetative and changing than any—even the most adequate—formal expression of it can be. It is much to say for a brief compendium of a nation's laws that it preserves all the grain, even though it incorporates some of the husks also.

The XII. Tables undoubtedly performed one important function of every true code. They collected together rules of law from a variety of quarters which owed their existence to very different historical causes. It is for this reason that an epoch of great or even violent political change has usually been found to be an essential condition for the formal re-publication of a nation's laws. It is almost impossible to determine now, as it probably was even in the days of Cicero, how much of the materials of the XII. Tables belonged to well-ascertained Roman usage; how much to modifications of that usage introduced by the Decemvirs; how much to foreign law deliberately introduced from without; and how much to new legislative enterprises which were the momentary result and expression of political contests between different classes of society.

So far as the history of the formation of Roman law is concerned, it is sufficient to notice that the framing of the XII. Tables had the effect of bringing a variety of kinds of law on to a common and level platform. They were thus always before the eyes of the people as one integral whole, and were in the best possible situations for inviting disputation and criticism at the hands of legal practitioners, and for supplying a basis for direct statutory innovations or judicial decisions as new circumstances called for them.

CHAPTER II.

THE GROWTH OF THE UNWRITTEN LAW (*Jus Civile.*)

§ 1.—*The Period from the Date of the XII. Tables* (B.C. 450) *to the Birth of Cicero* (B.C. 106).

IN tracing the whole outward history of the Roman "Civil Law,"—strictly so called—up to the time of Justinian, it is convenient to break it up into three periods; namely, that between the era of the XII. Tables, say B.C. 450, and the birth of Cicero, B.C. 106; that between the era of Cicero and the era of Modestinus, the last of the race of the great Roman jurists, say about A.D. 245; and the period between this and the death of Justinian, in A.D. 565. The first of these periods is of the length of nearly four hundred years, while that of each of the two later periods is about three hundred years. The greater length of the first period is conformable to the slowness of the growth of all the elements of the Roman state up to within a hundred years of the close of the republic. Cicero's own writings afford such a valuable mass of evidence of the state of the law in his time, of the past history of the law, and of the attitude of the Roman lawyers of his day to the older law that the era of Cicero presents, on more grounds than one, a natural close to one legal period and the commencement of another.

There seem to have been two main directions in which, apart from direct statutory legislation and the exercise of the Prætor's judicial functions (to be described later on), Roman law progressed, as it were spontaneously, between the era of the XII. Tables and that of Cicero. These are

the gradual increase in simplicity, regularity, and certainty, of procedure ; and the incessant interpretation, whether of the rules of law contained in the XII. Tables or of current customary maxims, which was conducted by an increasing class of men whose tastes, social positions, or public duties led them to give a special amount of study to the historical and logical development of law.

Two glimpses are afforded us at intervals of about a hundred years of wide-spread changes in procedure brought about by nothing else, so far as the narrative discloses, than the public spirit of individual citizens. The story is that about B.C. 310, Lucius Flavius, the Dig. (i. 2). son of a freedman, and secretary to the censor, Appius Claudius Cæcus, obtained access, whether with or without the concert of his master, to that part of the law a knowledge of which had hitherto been confined to select classes of persons in the community, such as the patricians generally or the Pontifices. These secluded portions of the law appear to have covered not only the *actiones legis*—that is, the ceremonies of judicial procedure—but also the *actus legitimi*, or the technicalities of private legal transactions. To the former head belonged the *formulæ*—that is, the typical shapes which all pleading must necessarily assume ; to both heads belonged the rules of the calendar (the "Fasti") which determined what legal acts or proceeding could or could not take place on particular days.

It is said that Flavius, either by possessing himself of a book belonging to his master, or by persistently seeking advice on points of legal practice and comparing the answers, succeeded in preparing and publishing a work in which all that part of the law acquaintance with which was hitherto confined to a few was laid open to all. This work was called the "Jus Flavianum," in the same way that an earlier work, related to have been compiled by Papirius in the time of the kings, was named the "Jus Papirianum."

Another tradition records that the patrician jurists framed new rules and invented a cipher with the view of keeping them secret. These new rules were, however, a

hundred years after (B.C. 200), divulged to the people by Sextus Ælius Catus, in a work called the "Jus Ælianum." A work of this Ælius Catus, probably the very work here alluded to, is described by Pomponius, the author of the long historical passage at the opening of the Digest, writing about A.D. 20, as existing in his day. It was called "Tripertita" on the ground of its containing, first, the law of the XII. Tables, then, an "interpretation," and thereto woven-in as supplementary matter (*subtexitur*), the *legis actio* applicable. This work is further characterized as comprising the "cradle of law" (*cunabula juris*). The intimation thus supplied of the contents of this early legal treatise is extremely interesting, both as marking the actual elements out of which the Roman civil law was developed, and also as a proof of the gulf of legal thought which separated the two periods of B.C. 200 and A.D. 120.

With respect to the general value of the stories relating to the sudden and wide-spreading effect of the publication of the "Fasti" and forms of proceedings by Flavius and Ælius, it may well be supposed that they rather indicate long operating tendencies than strictly correspond to the state of the facts. Procedure, and all that pertains to procedure, is, in some of its aspects, that part of the law which is most secluded from the view of the public; which must needs be traditionally passed on by one generation of professional practitioners to another; and which, in consequence, the least admits of the minute and almost imperceptible changes which the other part of the law silently experiences.

It thus happens that laws of procedure are peculiarly apt to lag behind the rest of the law in respect of their adaptation to national wants, and it is only when a great political crisis occurs, or the national intellect is otherwise spasmodically roused, that the process of administering justice undergoes the renovation which it has long needed. It is probable that the alleged discovery and the public-spirited activity of Flavius were only links in a chain of causes which had long been tending to compel a thorough reform in the mode of administering justice. The orderly habits,

the commercial relations, and the social institutions of the Romans in the fourth century before the Christian era must have rendered it increasingly injurious to the public well-being for it to remain within the discretionary power of a privileged class to deny, to delay, or to obstruct public justice.

The description given by Pomponius of the "Tripertita" further illustrates the important connection in early times between the evolution of the processes for administering justice and that of the substance of the general law. The earliest part of all law is necessarily procedure, because it is only at the moment at which an alleged right comes into question that the validity of the right itself is ascertained. It is by the intervention of the primitive arbitrator or magistrate that custom assumes the fixity, the cogency, and the universality, of true law.

An attentive study of the surviving fragments of the XII. Tables discloses the vastly superior importance in the eyes of the primitive legislator of that part of the law which describes and restricts remedies over that part which confers rights or imposes duties. The influence of the early *leges actiones* (under which expression were gathered not only formal processes for setting the law in motion under the cognizance of judicial authority, but also certain extra-judicial acts by which a person was allowed in certain cases to take the law into his own hands) in moulding the law into shape, and more especially in moulding the minds and sentiments of all persons concerned in administering or advising upon it, is clearly exposed to view in the historical parts of Gaius' Institutes, and in the curious and half-satirical allusions of Cicero. It was by the Prætor's influence—as will be shown later on—assisted by direct legislation, that the true provinces of what have been called "substantive" and "adjective" law were clearly determined.

However great was the influence brought to bear on the formation of the Roman civil law of the simplification and promulgation of remedial processes, the most effective instrument by which this law was brought out of its con-

fined and purely customary stage, as exhibited at the time of the XII. Tables, to what it was even in the days of Cicero, was the independent mental labour bestowed upon it by the growing class of professional lawyers.

It would, of course, be an anachronism to allege that during this period there existed any true legal profession in the modern sense. But for the purpose of modifying and creating law there were all the essential elements of one. There were, first, the privileged officials, such as the Pontifices, whose customary functions obliged them to be familiar with legal formalities in order to determine their validity at certain times or under certain special circumstances. There were, secondly, the public magistrates, who were either engaged in superintending the general administration of justice, or in devising legislative measures, mostly of a constitutional kind, for the amendment of the law. There was, thirdly, the whole class of the patricians, whose relations to their clients obliged them to be familiar with all the parts of the law by which their clients' interests might be affected, in order to reply to questions which might be proposed to them, to appear on behalf of their clients before a public tribunal, or possibly to give the requisite security for their clients which a creditor or plaintiff might demand (*ad respondendum et ad agendum et ad cavendum*).

Cic. De Orat. xlviii.

The picture presented of the relations between the learned patrician and his clients, in respect of the communication of legal aid, is an extremely attractive one, and has often been drawn by Cicero and later writers. The first aspect in which he appears is that of a man either sitting leisurely at home or walking in the public places of the city, and freely giving counsel and information to all persons entitled to ask for it on all sorts of topics—legal, moral, and practical. The next aspect in which he appears, is that of one taking up a more formal position at the entrance of his house, dispensing opinions on points carefully prepared and submitted, while the younger patricians stand around with their note-books in their hands, taking down the law

from the mouth of the master and laying up in store for themselves a capacity for hereafter becoming authorities on civil law to the next generation. The next aspect belongs to a later period, when Augustus and succeeding emperors conceded, as will be described later on, special privileges to juris-consults selected by themselves.

It would seem, however, that though the responsibility of advising his clients in matters of law would rest upon every patrician, yet that it soon came about not only that some patricians bestowed a more devoted study on the subject than others, but that these invited to attend their audiences all persons whatever who needed advice on matters of special complexity. Tiberius Coruncanius (before B.C. 250), the first plebeian Pontifex Maximus, is mentioned by Pomponius as the first who made a "profession" of law, and though no writing of his was then in existence, yet a variety of answers and brief comments have been handed down. Seneca (A.D. 60) alludes to some of these in a passage which quaintly denotes their antiquarian character. In complaining of orators of his day who are always borrowing words belonging to the older time, he says, "They keep using words out of the XII. Tables, and going back to Appius and Coruncanius." Ep. cxiv.

This growing study of law as a special science was largely stimulated and supplemented by what Pomponius calls the "*disputatio fori*," that is, the actual legal arguments that were conducted in courts of justice. Pomponius, indeed, says that the joint result of actual forensic controversy and the unwritten logic evolved by special legal students constituted the Roman civil law. Two consequences rapidly followed. One was that eminent jurists betook themselves to writing legal treatises, of which we have a most remarkable instance in Quintus Mucius Scævola, the Pontifex, so nobly commemorated by Cicero, who is said to have written one treatise on the civil law, the whole of which he distributed into eighteen books, and another treatise on legal definitions or maxims, from which there are four extracts in the Cicero, De Orat. i. 39; Dig. (i. 2).

Digest. The other consequence was the gradual rise of a lower order of legal teachers, who instructed the young for a fixed remuneration. The proper history, however, of these teachers, who became afterwards publicly recognized as "professors," and of the scholastic institutions for the study of law, belongs to a later period, in the account of which they will shortly find their place.

In reflecting on the general influences to which the Roman civil law, strictly so called, owed its formation during the period of four hundred years which elapsed between the publication of the XII. Tables and the birth of Cicero, it is impossible not to be struck by the spontaneous legal energy which wrought up the hard, narrow, and formal principles of the primitive law into the exuberant and plastic system which prevailed at the close of the period. If it is true that the personal instrument through which this energy chiefly appears to have manifested itself was the Prætor, it is none the less true that the material with which he worked was a mass of rules and principles rapidly undergoing spontaneous changes, wholly independent of anything he could do for them.

The basis of the law is always assumed to be the institutions and usages of which the XII. Tables were the abbreviated summary. But this summary was always regarded as ascertaining the field, and not as limiting the scope, of legal development. The "interpretation" of the written letter of the law was always regarded as a proper and worthy function of a cultivated and statesmanlike intellect. The controversial "disputes" of the Forum, instead of degenerating into bickering and pettifogging, only assisted, by the flash of contesting minds, to precipitate inevitable logical conclusions. Hence the general soundness of political life enforced and protected the notion that legal principles were not matters of accident or capricious disposition, but belonged to the realm of an inexorable logic.

It is even apparent from the writings of Cicero that the severely logical character of law led to its technical study, elevated as that was held to be, being treated as one

degree lower in dignity than that of the political orator, or even the forensic advocate. The interesting passage in which Cicero compares the attainments of Scævola and of Servius Sulpicius discloses a certain consciousness in the contemporary Roman mind of the inferiority of the purely logical exercise to which an exclusive study of law gave rise, as contrasted with the nobler uses of the intellect called for by a philosophical, rhetorical, or merely political concern with law. Cic. Brutus, xl., xli.

No doubt, in Cicero's own mind, always tempted to be diffuse and imaginative, there lurked a certain impatience with, and scorn of, all sorts of antiquated legal formalities, even the most indispensable. He sometimes indulges himself in not only deriding obsolete ceremonials which had survived their usefulness, but in talking of the very flesh and bones of the Roman as of all other possible legal systems, as if such topics were nauseous to every enlightened and public-spirited intellect.

Thus Cicero's own writings would supply the proof, if proof were not abundantly supplied elsewhere, that by his time the Roman civil law had, quite independently of all that express legislation and the interposition of the Prætor could effect, marched forward in an even, rapid, and strictly logical course; that it had drawn to itself the absorbed attention of the most luminous thinkers of the day; and that, while it had long ceased to be cabined and confined by the bands of early local usage, it had none the less retained the severe lines and landmarks which the national capacity for legal logic impressed and perseveringly maintained. Cic. Murenâ, xii.; De Orat. xxxviii.

§ 2.—*The Period from the Birth of Cicero* (B.C. 106) *to the era of Modestinus* (A.D. 245).

The period of the life of Cicero included events of wide political importance to Rome, which of themselves could not but have had a profound and lasting influence on the structure of Roman law. But it would be an historical

as much as a political error to consider such catastrophes as the Social, Servile, and Civil wars as sudden and incalculable phenomena, rather than as the necessary development of a long train of ceaselessly operating causes.

For the purpose of strictly legal history, it is only necessary here to advert to the inappropriateness which the circumscribed legal rules and institutions of early Roman law must have soon disclosed as they came to be applied to persons, things, and places, wholly diverse from those amidst which they had grown up. For a long period the intervention of the Prætor Peregrinus, and subsequently of the other Prætors and provincial governors, succeeded in straining the older Civil Law so as to enable it to bear the constantly increasing weight cast upon it.

How much these magistrates contributed, and in what ways, will be the special subject of a later chapter. It is here to be noted that the two main directions in which their characteristic work displayed itself was in amplifying and simplifying procedure, and, in cases where moral claims seem to come into competition with strict legal rights, supporting the former as against the latter. It is obvious that legal reformation of these sorts, widely important as it was, could never be sufficient to meet the exigencies of such a rapidly expansive community as that of the Roman State. The true need was that of an internal reconstitution of the very kernel of the Civil Law, and it was because the Romans showed themselves capable of effecting this by a series of almost imperceptible changes that they proved themselves masters of that part of the art of government which consists in justly regulating the relationships of private, social, and commercial life.

The modes in which this process of reconstitution were gradually effected, up to nearly the close of the republic, have been already dwelt upon. But it was in the last century of the republic and at the commencement of the empire that the demands for an adequate legal system, based upon notions of moral justice and a peremptory logic, became most urgent. It is remarkable that Julius Cæsar,

the best exponent of the ideas of his time—that is, of the expiring republic and the dawning empire—is related to have desired to "reduce the whole civil law into a moderate bulk, and out of the immense and scattered abundance of laws to compress what was best and most serviceable into as few books as possible." Suetonius, Jul. 14.

It has often been remarked that as public liberty died out in Rome, and all honest avenues to public reputation were closed, the professional study of law acquired an enormous impetus, and law itself attained a development such as no other condition of society has ever witnessed. It has been noticed above that Cicero recognized a certain antipathy between the functions of the political orator or advocate and the mere jurisconsult, and that he compared the dignity of their functions in a way not wholly favourable to the latter.

It might well be, when the freedom of advocacy and political liberty of speech were both at an end, that the functions of the jurisconsult acquired fresh life. This was the more likely to be the case, as law was the only original product of the Roman mind. Philosophy, science, poetry, and even history have been wrought to a far higher pitch of perfection by the Greeks, who were first in the field, and whom the Romans only limped after with a halting step. But the peculiar family and civic relationships of private life in Rome, as well as the ceaselessly new problems of government presented by every fresh conquest, at once originated the need for an adequate legal system, and roused all the best intellectual energy of Rome to provide it.

The patronage extended to the jurisconsults by the emperors, interesting as it is as a proof of their recognized political importance, was probably an effort to destroy the last refuge of independence, and was not dictated by a genuine zeal for legal improvement. Pomponius relates that Augustus, "with a view to greater authority being imparted to the law, enacted that legal opinions should be given on his own authority (*ex autori-tate ejus*), and that from this time this right began Dig. (i. 2).

to be applied for as a privilege." Caligula (B.C. 67), with a wild petulance worthy of him, is described by Suetonius as boasting that "with respect to the jurisconsults (as though he was going to abolish all use of their skill), he would effectually secure that no one should give any legal opinions but himself." A rescript of Hadrian, quoted by Pomponius as having been written in reply to a request of some persons of prætorian rank, that they might have the privilege of giving legal opinions under the emperor's sanction, was to the effect that "this was not a matter of petition, but was a service to be rendered by them, and so he should be delighted if any one who believed himself competent would set himself to giving legal advice to those who required it." The exact import of this rescript has been largely discussed by modern French and German writers, in order to extract from it the exact import and effect of the special patronage alluded to. Puchta's opinion seems reasonable enough that the rescript is merely cited by Pomponius by way of showing the flattering manner in which the emperor regarded the juristical profession, and that the passage cannot be used for establishing any theory whatever. A more cogent indication of the nature and limits of the imperial patronage is given by Pomponius himself, when he says, that before the time of Augustus "the privilege of giving legal opinions to all who require them (*publice respondendi*) was not recorded, but every one who held himself to be competent gave them freely; and that they did not give their opinions under seal, but generally wrote themselves to the judges, or those who consulted them called them as witnesses." And Gaius, in a well-known passage, says that in his time (circ. A.D. 120), "if all the jurists who had a special licence to give advice were of one opinion, that opinion was held to be law; if they differed, the judge might follow what opinion he chose, as is laid down in a rescript of the Emperor Hadrian."

Suet. Calig. 34.

A.D. 117.

Puchta, Instit.

Gaius i. 7.

The direct influence which the emperors must have exerted over the jurisconsults, as well as the reciprocal

influence which the jurisconsults must have exerted over the imperial legislation, is manifest from what Suetonius and the other imperial biographers tell us of the practice of the emperors to summon to their councils leading persons in the State, specially qualified by their studies and attainments to advise on the particular business in hand. This council (*concilium*), so irregularly constituted, became a fixed institution under the name of the Consistorium after the time of Diocletian, and the *auditorium*, mentioned by Ulpian in the Digest, seems to have been the same council sitting for the purpose of giving judgment.

Suet. Octav. 35; and see Ortolan. i. p. 285. A.D. 284. Instit. iv. 25. Prf. L. 22, D. (xxxvi. 1).

The passage in Aulus Gellius, in which he speaks of the public places at Rome specially used by those engaged in publicly teaching law, or in giving opinions, seems to indicate a transitional stage between the purely domestic character of the functions of the earlier jurisconsults and the purely official character into which the functions of the later jurists degenerated.

The history of the celebrated division of the Roman jurisconsults in the time of Augustus, afterwards known as the two schools of the Sabinians and the Proculians, dating their descent severally from Ateius Capito and Antistius Labeo, is interesting, rather from the light it throws on the high organization which had begun to prevail in juridical studies than from any certain conclusions which can thereby be drawn as to the principles at issue between the rival schools. There are several suggestive notices, by the earliest Roman authorities, of the biographies of the founders of these two schools, and it is natural that circumstances in their personal history should have been made the most of to explain such characteristic modes of thought as can clearly be attributed to one school or to the other. It would seem that at least it was the prevalent belief among their successors, that while both Capito and Labeo were equals in erudition and in acuteness of mind, yet that Capito owed his eminence rather to imperial

Tacit. Annal. iii. 75. Aul. Gell. xiii. 12. D. (i. 2.) Suet. Oct. 54.

favour, and Labeo to his own independent efforts, assisted by popular zeal on his behalf.

From these initial facts it was easy and natural to attribute to the followers of the former a certain conservatism of view, which held to the external letter of what was established by uniform tradition; and to the followers of the latter a disposition to revert to general principles, whether based on notions of utility and justice or on some other comprehensive rule of interpretation. It is, however, to be remarked that such differences as these would only have been important in questions of doubtful interpretation; and it is quite in accordance with experience that the points of difference between the two schools, though matters of heated controversy at the moment, were practically insignificant and few in number when compared with the points of agreement. It is certain that Capito is quoted in the Digest by his contemporary Labeo and by Proculus, the most eminent of Labeo's followers. And it is well known that Gaius, who speaks of the Sabinians as *nostri præceptores*, does not invariably adopt their opinions.

L. 23 Dig. (iii. 79.) L. 8 Dig. (ii. 13.)

It is thus highly probable that the two schools, while each cherishing with a certain sort of veneration their several founders and the illustrious names successively figuring in each, rather helped on a spirited devotion to legal studies by generating an enthusiastic competition and by rallying round names and persons the eager intellect of the more youthful jurists. It was in this way that the rise and prominence of these two schools tended to prepare the way for the extraordinary development of juridical study and skill through the whole of the second century of the Christian era. And the story of the influence of the patronage of Augustus on the fortunes of the original founders of the two schools serves to connect the official aspect, which the study of law was gradually acquiring, with the independent organization which the zealous culture of it as a field for intellectual activity was finding for itself.

Smith's Dic. Biog. Art. *Capito.*

The era of those who may be called the classical jurists cannot be sharply defined, except by saying that it began —so far as any monuments of it remain—with Gaius and ended with Modestinus. Gaius must have been born after the accession of Hadrian, A.D. 117, and probably wrote up to the times of Marcus Aurelius, who succeeded in A.D. 161. The exact date of Gaius is notoriously a matter of almost insoluble controversy, the evidence for the different dates proposed resting upon the modes in which he alludes to the emperors in his works, and on the account he gives of institutions which are known to have undergone changes at well-established dates. Modestinus, the last of the great Roman jurists, was still writing in the reign of Alexander Severus, who succeeded in A.D. 222, whom he mentions in an extract from his works given in the Digest.

Smith's Dic. Biog. Art. *Gaius.* A.D. 222. L. 29, D. (xxix. 10.)

There are many grounds on which it is important, in tracing the formation of the Roman civil law, to pay attention to this line of jurists, not only as presenting a general phenomenon deserving particular analysis, but also with respect to the five best known to us as of distinct individual importance.

In the first place, the advent of this order of legal students is marked by the rise, for the first time, of a great and permanent juridical literature. Though before Cicero occasional writers had published legal treatises, and though the habit of legal composition had been growing gradually, yet the richness and exactness of the juridical literature which marks this period are facts really new, and not merely new in appearance because of the loss of previous monuments. The literature, which forms the substance of the Digest, as compiled under Justinian's auspices, consists of treatises of a vast variety of sorts. Some of these works are described as "books" or "commentaries," the subject being the Perpetual Edict, or the Provincial Edict; some as collections of "opinions" or of "replies"—possibly made by students and corrected by the masters; some as "questions;" some as "epitomes;" some as books of "practice" (*actionum*); some as "rules;" many as

"digests;" some as "disputations;" and, lastly, some as "institutes."

Besides the rich opportunity afforded us of understanding and criticizing this literature, as it appears in the somewhat mutilated passages of the Digest, we are fortunate enough now to possess two or three more or less complete specimens of it in its integrity. We have considerable fragments of Ulpian's "Rules," and of Paul's "Sentences." Gaius' Institutes were, up to A.D. 1816, known only from the disfigured epitome of part of them contained in the code of the Visigoths, and were brought to light by Niebuhr, who found them in the library of the chapter-house at Verona, on a palimpsest, on which the letters of St. Jerome had been written over them once, and, for part of the manuscripts, twice. This discovery had been almost anticipated by Scipio Maffei, in 1732; and Haubold was just recalling the attention of the public to the fragments published by Maffei, when Niebuhr deciphered the whole of the obliterated writing, and, with Savigny's aid, ascertained their true character.

A.D. 506.

A.D. 1732.

The discovery had a most important influence on the study of the history of Roman law, as Gaius' Institutes are not only eminently historical in character, and trace back all the leading institutions and legal formularies to their earliest origin, and through their successive changes, but present a living picture of the law as it was in Gaius' own time, which was somewhere between A.D. 117 and A.D. 180, and consequently four hundred years before the publication of the Institutes of Justinian. As both the form and the substance of Justinian's Institute are closely copied from the Institutes of Gaius, so far as the older law had not become obsolete, it is obvious that Gaius' work is an invaluable aid in clearing up the historical difficulties of the later treatise.

See Smith's Dict. of Biography, Gaius.

A.D. 117.
A.D. 180.

Gaius seems rather to have been a teacher of law than an authoritative jurist, in the strict sense of the word. He is only mentioned as an authority

L. 39, D. (xlv. 3).

once in the Digest; and there is reason to doubt whether he is the author referred to in that place. That little authority attached to his name may be gathered from the rescript of Theodosius II. and Valentinian III. in A.D. 436, directing the same authority to be accorded to the writings of Gaius as to the writings of Papinian, Paulus, Ulpian, and Modestinus. The Digest of Justinian includes a considerable number of extracts from the writings of Gaius. It has been said that Gaius' Institutes was not a systematic treatise, composed and prepared for publication like the Institutes of Justinian, but a sketch of lectures, to be delivered on the legal questions most discussed at the time, corrected and amplified afterwards by the lecturer's own recollections of his *vivâ voce* filling up, or by reference to notes, taken by some one of his auditors. Anyway, it is certain that Gaius' Institutes, as well as other treatises of his, were distinctly educational treatises, and were persistently used as such for ages afterwards by teachers of law; and this fact alone proves both the influence which the schools of law must have acquired at and after Gaius' time over the formation of the substance of the law, and also the high development of these schools.

1 Cod. Th. 4. 3.

Preface to Abdy and Walker's Gaius.

There are many grounds for believing that the fame of Papinian eclipsed that of every other Roman jurist, and his influence on the formation of the law must have been of a preponderant kind. He held the highest offices of state under Marcus Antoninus and Severus; and it was commonly reported that he was put to death by Caracella because he refused to address to the senate a defence of the emperor for murdering his brother Geta. Puchta points out that, by his death, he established the doctrine cited in the Digest from his works. "For we must not believe it to be possible for us to do deeds which offend against piety, public credit, honour, and (speaking generally) morality." Furthermore, the

Papinian, Cir. A.D. 161–211. See Puchta, Cursus, § 100, and Smith's Dict. of Biog.

L. 15, D. (xxviii. 7).

writings of Papinian, so far as we can form an opinion of them from the very numerous citations from them in the Digest, amounting to 595 in all, are, on the confession of all competent authorities, of a quality of excellence which amply justifies the extraordinary reputation in which he was held by his contemporaries and by his immediate successors. The nature of this reputation may be gathered from the rescript of Theodosius and Valentinian already alluded to, which, after declaring that all the writings of Papinian, Paul, Gaius, Ulpian, and Modestinus were to be authoritative for the judge, and that, in case of variety of opinion, the opinion of the majority was to prevail, goes on to enact that in case of equality the side on which Papinian was should prevail.

1 Cod. Th. 4.

Ulpian and Paul are described as both being pupils of Papinian, and they each held some of the most important offices of State. We are fortunate in possessing, besides the very numerous extracts from the writings of both of them contained in the Digest, considerable fragments of important works of both of them. The "Liber Singularis Regularum" of Ulpian has by some been supposed to be an epitome of matter contained in other works or in some other work. But there are good grounds for believing it to be a hand-book intended for the use of practical lawyers. It is extremely simple in structure, describing the law on the subjects treated of, and especially the procedure, as it was in the writer's time, and is a valuable specimen of a class of works which must have told considerably on the development of law. The work of Paul has been preserved in the Visigothic code under the name of the *Sententiæ Receptæ*. This work is one of great importance for historical purposes, though it is not easy to determine, from the form in which it has come down to us, what was its earliest character. It has been estimated that the excerpts from Ulpian and Paul make up about half the Digest.

Ulpian and Paul. A.D. 180–237.

Abdy and Walker's Ulpian *Pref.*

Modestinus, the latest of the series of conspicuously

eminent jurists, and from whose writings there are extracts in the Digest, was a pupil of Ulpian whom he cities as "*egregius*," one of the members of Alexander Severus' council, and a teacher of law to the younger Macrinus. 345

Modestinus, A.D. 180–245. L. 2, § 5, D. (xxvi. 6).

The five jurists of whom a brief account has just been given have been selected out of a long list, solely to exhibit characteristic specimens of the sort of influences under which Roman law was moulded into its most complete shape. The fact that the writings of these jurists alone contributed the larger portion of Justinian's Digest and were the basis of his Institutes is, of itself, sufficient to arrest attention on behalf of their names and biographies. The biographical incidents, which have been above recited in the lives of each of them, help to throw a great deal of light on the sort and direction of the forces which, in their day, were operating on Roman law.

All but Gaius held high offices in the State, and generally enjoyed the personal confidence of the reigning emperor and his family. They are all represented as either professional teachers of law, or they published treatises of a strictly educational character. They are generally described as men of great moral worth as well as intellectual eminence, and some facts in their lives as well as their surviving works certainly justify this description. Lastly, they combined all the qualifications needed to construct a dominant and lasting school of legal thought. They were in active intellectual sympathy with each other ; they were historical without being antiquarian in their conceptions ; they were severely logical without being unaware of the limits within which formal logic is alone applicable to legal and ethical notions ; and they were never indifferent to the claims of abstract justice, even when those claims had, for the moment, to give way to the demands of positive legislation, inveterate usage, or voluntary agreement.

Thus the great race of jurists, of which the five commemorated are the most notable members, had all the capacity, in their personal endowments, needed for build-

ing up a comprehensive, exact, and skilfully adjusted, legal system: as writers, they had all the disposition to communicate their ideal not only to their own generation, but to the next; and as active statesmen, in the constant employ of a government which reposed complete confidence in them, they had all the opportunity as well as the impulse to impress their conceptions on the law of the empire. Thus, when we are told in Justinian's preface to his Digest that, in the great legal schools of the empire, it was, in his day, the fashion to devote out of the five years' course the greater part of one (the third) year to the study of the writings of Papinian, and of another (the fourth) year to those of Paulus, while the Institutes of Gaius formed the subject of the first year, we are rather interested to discover the eagerness with which the influence of the great masters of law was perpetuated and economized for more than three hundred years than surprised at the otherwise remarkable continuity which Roman law exhibited during that long period.

Pr. D. ad Antecessores.

§ 3.—*The Period from the Era of Modestinus* (A.D. 245) *to the Death of Justinian* (A.D. 563).

During the three hundred years which intervened between the era of Modestinus, who is usually reckoned as the latest of the great race of jurists, and that of Justinian, the main influences which directly affected the formation of the "common law" of Rome were those due, first to systematic legal education; and, secondly, to the public authorization given by the government from time to time to the writings of former jurists.

Before the end of the third century the school at Berytus, in Syria, was already celebrated, and though it was more than once destroyed by an earthquake and the school dispersed, yet it survived till the time of Justinian as one of the three great legal schools of the empire. Rome and Constantinople are specially mentioned as con-

Heinecc. L. 1, § 361, Hist. Jur. Rom.

L. 1, Cod. Th. (xiv. 9).

taining academies for the pursuit of "liberal studies" in a constitution of Valentinian I., Valens, and Gratian, in A.D. 370; and it is interesting to notice that St. Augustine in his "Confessions" mentions that in A.D. 372, two years after the promulgation of that law, he resorted to Rome for purposes of study, because he heard that the young men there pursued their studies in a quieter and better disciplined way than at Carthage. By a later constitution of Theodosius II. and Valentinian III. (A.D. 425), a school was especially established, or rather the existing one was reorganized, at Constantinople. Out of a number of professors of different subjects, two were to be specially appointed to explain the rules of law and right (*qui juris ac legum voluntates pandant*). All unauthorized professors were forbidden to teach publicly, and the authorized professors were forbidden to teach privately.

Aug. Con. 5, 8.

Cod. J. (xi. 18).

But it is from the remarkable preface (already cited) which Justinian addresses, at the commencement of his Digest, to the legal professors of his day that the state of legal education then and previously can best be understood. In criticising the subjects and mode of teaching in the five years' legal course, Justinian chiefly complains of the partial, irregular, and unsystematic training that was given in the successive years; and he evidently considers (what is obvious enough from other indications) that one use which his Institutes, Digest and Code will serve will be that of supplying, each in its turn, the special sort of instruction needed at the corresponding stage. He clearly is of opinion, also, that legal education was suffering from a too narrow-minded adhesion to a very few popular models, and that this fault would be corrected by the wider view of legal writers which his Digest had opened out.

It is thus plain that, during the previous three hundred years, all that a highly organized legal education could do, in the chief capital cities, to advance the strict logical progress of law in the grooves which the Antonine jurists had prescribed for it, was abundantly done—even in excess. Justinian, indeed, in confining the public teaching of law

to the cities of Rome, Constantinople, and Berytus, and disallowing such teaching in Alexandria and Cæsarea, assigns, as grounds for his protective policy, reasons which had no doubt silently operated long before his time. He alleges that in Alexandria and Cæsarea, and other cities incompetent persons were dispersed about, and communicated "adulterated doctrines" to their disciples. Should they repeat their offence, they are threatened with the penalty of a fine and of being ejected from the city in which "they do not teach but break the laws."

Con. ad. Antecess. § 7.

With respect to the methods of legal education as bearing on the progress of law, it is observable that (as appears from Justinian's preface) a considerable part of it consisted in committing the very words of eminent legal writers to heart. The lecturer seems, in fact, to have dealt out from time to time particular parts of the written law (as of the Prætor's "Perpetual Edict") or of the treatise of a well-known writer, selecting always the parts which were neither obsolete nor unsuited for students. The want of printed books rendered this course necessary; and the habit of thus learning law largely by rote no doubt had its influence on the mind of lawyers and on the form of the law as they cited and argued from it. It would always have a tendency to become neat and aphoristic, and even what is called "sing-song" and alliterative. The vast quantity of brief legal maxims existing in Roman law, as well as the extraordinary condensation of style in which it is always expressed, give considerable colour to this theory of the influence of recitative exercises.

During the period now under review, we are able to trace in the constitutions of the emperors the influence they exercised, by interposing their personal authority, in determining the measure of judicial credit which should be accorded to the writings of deceased jurists. The early constitution of Hadrian, already alluded to, by which he accorded the force of law to the opinions of publicly qualified lawyers may or may not have extended to the writings of lawyers who were

Gaius. 1, § 7.

deceased; but, any way, it was a precedent for applying, at the discretion of the emperor, a quantitative and qualitative test to legal opinions. In A.D. 321 Constantine enacted that Papinian's opinion was not to be held to be qualified by the notes with which Ulpian and Paul had supplemented it; and this law of interpretation is alluded to and re-enacted in a later law (A.D. 426) of Theodosius II. and Valentinian III., and again re-inforced by Justinian in A.D. 530, who further alludes to a similar exclusion of notes of Marcian on Papinian. The exact terms of a constitution of the year A.D. 327, in favour of the writings of Paul, have only come to light through the recently discovered texts of the Theodosian code. It declares that "everything that is contained in the writings of Paulus is confirmed and authoritatively established;" and it goes on to speak of his sentences in language of almost exuberant praise. What is called the "Law of Citations" of Theodosius II. and Valentinian III. (A.D. 426) respecting the weight which is to be attached to the writings of Papinian, Paulus, Gaius, Ulpian, and Modestinus, or to the majority, or to the side on which Papinian was found, has been previously alluded to.

Cod. Th. (ix. 43).

L. 3, Cod. Th. (i. 4). L. 1, Cod. J. (i. 17.)

L. 2, Cod. Th. (i. 4).

L. 3, Cod. Th. (i. 4).

This class of imperial legislation, in which Papinian throughout maintains his position of authority untouched, is a proof of the curious conflict that was at work between the influence of statutory legislation, as represented by the emperor, and the spontaneous progress of the law, as represented in the free commentaries of professional jurists. It would seem, however, that the interference of the emperor was not capricious, and, in fact, coincided with the dictates of an honest and genuine criticism. In this way it was perhaps a serviceable guide to judges, and was the more necessary in consequence of the appellate jurisdiction which rested in the emperor.

The actual mode in which the opinions of deceased jurists were worked into the legal system of the day, and qualified by the constantly appearing imperial constitutions,

will be understood from a study of those remarkable fragments, bearing date about the middle of the fifth century and, thus, nearly contemporary with the construction of the Theodosian code (A.D. 438). They are termed the "Vatican fragments," "A Comparison of the Mosaic and Roman Laws," and a "Consultation of an Ancient Jurisconsult." These works are, of course, of the greatest value, not only for establishing actual tests of the law, but also for indicating the mode of legal reasoning prevalent at a date two hundred years later than that of the most eminent of the great race of jurists.

See Ortolan I. § 511.

CHAPTER III.

JUDICIAL LEGISLATION.

§ 1.—*From the Earliest Times to the Suppression of the Formulary System by Diocletian* (A.D. 294).

THE most decisive way in which law progresses in the earlier stages of society lies in the process of administering or applying the law. Laws of procedure are the earliest of all laws; or, to express it differently, it is by the formal adjudication of a disputed claim that the reality and the limitations of the claim itself first come to the light. Unconsciously pursued habits become recognized as prevalent customs; these customs are cited as rules to guide the arbitrator; the rules which have guided former arbitrators are held to be binding on each succeeding one; and, as the State grows and its executive organization becomes strengthened, the rules and principles in conformity with which rights are actually protected become transmuted into the laws which, on the one hand, define rights themselves, and, on the other hand, ascertain the modes of protecting and enforcing them. This intimate connection between the right and the remedy permanently subsists, though all the other circumstances which determine the growth of the law of course qualify its operation. Among these circumstances the conscious and independent action of judges is one of the most dominant, and the more so as that action is supported by traditional concurrence and sympathy.

Roman law affords a signal illustration of the enormous influence which a merely professional habit of administering justice, handed down by royal tradition, may exercise on the substance of law itself, even when the officials who are

called upon from time to time to administer justice are not lawyers by profession. It was in the hands of the Roman Prætor, acting as a supreme judge and controlled, as he was, from time to time by direct legislation, that the old rigid system of law became adapted to the finest exigencies of advanced social and commercial existence. A wholly novel system of law was grafted on to it, and an elastic system of popular remedies, wholly unknown to the older law, was invented and consistently applied.

The history of judicial legislation, in respect of its influence on the formation of Roman law, commences with the period of the legal actions (*legis actiones*) and terminates with that of the later emperors, in which the administration of justice was a purely executive function at every stage, and the emperors' privy council constituted the highest court.

It is to be noted that under the expression "judicial legislation" are contained both the necessary changes which law undergoes in the mere process of being administered, and the changes it undergoes through the conscious legislative activity of those who administer it. The substance of the law was qualified hardly less by the institution of the Prætor Urbanus than by the voluntary changes he subsequently introduced through the medium of his Edict.

The first stage of legal procedure at home was characterized by what were called the *legis actiones*, or modes of enforcing a claim which (as Gaius explains) were either directly given by statute or had to be pursued in strict accordance with the literal language of a statute. These modes, so far as they are described in the mutilated passage of Gaius, or can be understood from the allusions to them by Roman antiquarian authorities, seem to include processes of rude judicial execution, of an elementary reference to arbitration, and of formal suit and trial. They thus, historically, reach back to the most primitive legal age, and forward to a very advanced one.

Gaius (ii. 11). L. 2, § 6, D. (i. 2). L. 51. D. (xliv. 7). Aul. Gell. Noc. Att. 16, § 10.

In fact, of the five actions,—that is, the actiones *sacramenti, per judicis postulationem, per condictionem, per manus*

injectionem, per pignoris capionem,—the two last are nothing but such forcible remedies as early law just recognizes and regulates, being as yet impotent to abolish or improve. They are distinctly alluded to in the fragments of the XII. Tables which have come down to us.

The action *per condictionem,* on the other hand, by which a suitor was entitled to require his adversary to appear for trial within thirty days, was only introduced by a *lex Silia* for an ascertained debt about B.C. 240; and for any other matter in dispute, if ascertained, by a *lex Calpurnia* a few years later, and only just before the formal abolition of *legis actiones.* The *actio sacramenti,* which was based on the notion of a double deposit to be made by both parties, the loser forfeiting his deposit to the State, was particularly described in the XII. Tables, and had, no doubt, at the time of their publication, long been the ordinary mode of investigating disputed rights. The remaining action, that *per judicis postulationem,* was a provision for arbitration, or for formal judicial inquiry, without interposing the formalities of the *sacramentum.*

Thus the *actiones legis* have little in common with one another, except the negative marks that a limited discretion in allowing or in controlling the right of suing was left to the superintendent magistrate, and any flaw or error in complying with all the formalities imposed by law was irremediable. They were, however, not formally abolished by law till about B.C. 167 by the *lex Æbutia,* as further amended by some of the *leges Juliæ* passed in the reign of Augustus. But even under these laws the old system was retained in use for two classes of causes; that is, where an action was brought for an injury apprehended but not yet inflicted (*damnum infectum*), and in all cases in which the *centumviri* adjudicated, which, for the most part, seem to have been exclusively matters in which the old civil law regulating *status,* property, and succession was concerned. The increased use of the Prætor's *imperium,* exercised by his Interdict, gradually made the first class of causes obsolete, while the modifications of the older civil law by

B.C. 167.

Cic. de Orat. i. 38. Gaius iv. 95.

prætorian legislation and statute tended to bring about a like result in the case of the second class of causes.

The persistent mode for trying all classes of disputed causes at Rome, from the time of the XII. Tables to that of Diocletian, was to distribute the task of inquiry between an executive magistrate and a judge or body of judges. Neither the magistrate nor the judge or judges need have any professional acquaintance with law. They were only bound to comply strictly with the requirement of law, or, if discretion were left them, strictly to confine themselves within its limits.

The judges were chosen from different classes of the community at different periods, and at the same period for different classes of causes. Thus the earliest classes of judges seem to have been the "*decemviri stlitibus judicandis*," though little is known about them, and what little is known only affords matter for hopeless controversy. Rather later than the period of the XII. Tables the judges were either senators—one being named for each cause by the magistrate—or *recuperatores*, who, it would appear, were named in groups of twos, threes, or more, from any class of citizens or, possibly, freedmen, especially for cases in which the rights of foreigners or of foreigners and citizens together were implicated; or *centumviri*, a permanent body, to which each tribe contributed three elected members, and which sat in four or fewer sections to try cases in which the principles of the older civil law were peculiarly involved. At a later time the *judices* were chosen for ordinary causes from different classes of citizens, and the contentions between the *senatores* and *equites* in reference to this matter form a prominent feature in the later history of the republic. In the time of Diocletian the name *pedanei* was given to *judices*, to distinguish them from magistrates who decided the whole matter themselves in a judicial capacity.

L. 2, § 29, D. (i. 2). Liv. (iii. 55.)

Ortolan i. 165.

Bethman-Hollweg ii. § 71.

It might have been expected that the system of legal actions, in respect of which the investigation of law and

fact was superintended by one of the highest magistrates and conducted by a judge or body of unprofessional judges, selected generally (like modern jurymen) for each particular cause, would have a necessary course of development. The magistrate, even in the earliest times, would have to decide whether an alleged injury was presumably actionable or not, and if he held it were so, he would have to instruct, either orally or in writing, the judge as to which rule of law was infringed, if any, and, therefore, what were the matters of fact, strictly and alone, relevant to the inquiry. In most cases it would be clear enough on the very face of the facts, and so no formal communication from the magistrate would be needed.

In some cases, however, the law alleged to be violated might be an obscure one, or the relation between the law and the facts, as stated by the plaintiff, anything but obvious. In these cases the magistrate would be compelled to be very precise in his instruction, and might even think it expedient to leave the judge to inquire, not only what the actual facts of the case were, but also what were, in point of law, the antecedent legal rights and duties of the parties. Of course he would sharply limit the field of the investigation ; but it is important to notice that, so far as he enlarged or restricted the field of the judge's inquiry, so far it was the magistrate's discretion which governed the decision of the case, and not the strict letter of a written or traditionary rule of law. In this discretionary power, so left with the magistrate, of determining what matters should and what matters should not be held relevant, was contained the element of an arbitrary system, fatal to the integrity of the legal actions, and only saved from being fatal to liberty and public confidence by the device of the perpetual Edict. It will shortly appear that this arbitrary element became the medium of the most vital and vitalizing reforms.

The *leges actiones* were not formally abolished till about B.C. 167, but the final statutory blow given to them by the *lex Æbutia* must have been the mere political expression of a state of facts which time had already brought about. Statutes are more often in request to prevent the occasional

and perplexing revival of what is obsolete than to abolish what is in full vigour. It will have been seen from the above description of the necessary procedure attendant on the legal actions that the distribution of the process between the magistrate and the judge in itself prepared the way for a system of procedure which was the direct antithesis of the stiff and formal system of actions. This new system was the "formulary" system, which is described with great particularity by Gaius as being the ordinary practice in his day, though it was only a little more than a century afterwards that it, too, was practically superseded by the constitution of Diocletian, A.D. 294.

Gaius iv. 39.

The formulary system was, in fact, the reduction to a strictly methodical shape of all the parts of the process which the procedure in the case of the legal actions necessarily, though often only tacitly, involved. The "formula" was a compendiously written statement of the outer shell of the case, prepared by the co-operation of the plaintiff and the presiding magistrate for the information of the judge, to whom, within the limits sharply marked out by the terms of the document itself, was referred the inquiry into the disputed questions either of fact or of law, or of both combined. The functions and responsibilities of all parties were clearly defined on the face of the document. The magistrate had to ascertain whether any kind of right seemed to be involved or not, and, if so, what kind, and to have the corresponding clause inserted in the part of the formula called the *intentio*. The judge had to ascertain the liability of the defendant, or to determine between the competing claims of co-heirs, partners, or neighbouring proprietors; and, according as one duty or the other was cast upon him, a clause called the *condemnatio* or *adjudicatio* was inserted in the formula. The introductory clause, which stated in the barest form the fact on which the claim was originally grounded, was called the *demonstratio*.

The formula was altogether so brief, formal, skeleton-like, that it served the double purpose of leaving the

magistrate the largest amount of discretion in framing it and also of adapting itself at once to the remedies contemplated by the old *legis actiones* and the ampler ones contained in the Prætor's Edict. It was, in fact, a convenient transitional instrument, by which the great change from the dominion of the old technical civil law to that of the elastic, equitable system administered by the Prætor was facilitated and shrouded from public notice. This will appear more clearly from a consideration of the history of the Prætor's office.

The chief outward steps in the development of the Prætor's office are described by Pomponius, and are briefly alluded to by the Roman historians. It seems that up to B.C. 365 the Consuls assumed the supreme judicial authority, holding it by succession from the Kings, and that they were even occasionally called "Prætores." In consequence of the successful plebeian movement, about B.C. 365, a compromise was made by which one of the Consuls was hereafter to be a plebeian ; and a new patrician magistrate, or Prætor (specially so called), was to be appointed to preside over the administration of justice, possessing at the same time the general executive capacity (*imperium*) of the highest Roman official.

Heinecc. i. § 55. Hist. Jur.

Liv. vi. sub fin.

Bethman-Hollweg i. 17.

In the course of a hundred years the duties of this magistrate increased enormously, partly owing to the number of Roman citizens thronging from the neighbouring free towns and colonies to Rome in quest of justice, partly to the quantity of business increasing in Rome itself, and partly to the number of suits to which either foreigners resident in Rome were parties or in which citizens and foreigners were together parties. In the absence of the Consuls from Rome, the Prætor had also cast upon him the ordinary duties of civil administration.

In B.C. 264 another Prætor was appointed for the discharge of that part of the judicial business in which foreigners resident in Rome or foreigners and citizens jointly were concerned. He was called the Prætor Pere-

grinus; and, according to the most common view, it was at this time that the older Prætor, who maintained throughout a precedency over all other judicial magistrates, was styled the Prætor Urbanus. According to another view, the Prætor Urbanus was called so at the time of his original appointment in contradistinction to the Consuls, whose functions might have to be discharged outside, as well as inside, the city. There are two instances given by Livy of a single magistrate, even after the time of the appointment of a Prætor Peregrinus, discharging the functions of both Prætorships.

Liv. xxv. 3; xxxvii. 50. L. 2, D. (i. 2).

Pomponius describes the constant additions made to the number of the Prætors; some being appointed for new provinces as they became annexed and before the regular government of the provinces by Proprætors and Proconsuls had been organized. This was the case for the provinces of Sardinia, Sicily, Spain, and Gallia Narbonensis, which led to the creation of four fresh Prætors. Sylla introduced four more for criminal investigations; Julius Cæsar two more; Augustus four more; Claudius added two for trust-cases especially, from which Titus subtracted one, and Nerva added one for causes to which the treasury was a party. Thus, in the time of Pomponius (about A.D. 120), there were eighteen Prætors.

Even in the discharge of his strictly judicial functions the Prætor was at once an executive official and a judge. This fact was expressed by saying he had both the *imperium* and the *jurisdictio*. The *imperium* was the faculty of direct command, which was either formally conferred on an officer of the State for military purposes, whether at home or abroad (*merum imperium*), or was annexed by custom to the office of the chief administrator of public justice for the purpose of preventing, correcting, and punishing wrongs. The Prætor, who historically deduced his office from that of the Consul, and was throughout looked upon as his ordinary deputy, might be expected to have a *mixtum imperium* of a particularly extensive kind. And, indeed, it was owing to this active administrative capacity that he

was able to introduce such profound and beneficial changes into the substance of the law.

The Prætor was at once a judge, an executive magistrate, and,—partly through his "Edict," partly through his spontaneous decisions,—a legislator. He was at once a judge and an executive magistrate in respect of all matters which, from first to last, he settled himself, without deputing to another judge any part of the investigation. Thus his vast, though only gradually acquired, jurisdiction for protecting the claims of creditors, minors, *bonâ fide* possessors, and persons peculiarly exposed to the machinations of fraud, called for a judicial inquiry (*cognitio*) into the rights of the parties and into the circumstances of each case, followed by a grant or confirmation of possession (*interdictum*), by a restitution of a minor to a position of legal right forfeited by his inexperience (*restitutio ad integrum*), or by the exaction of a preliminary security as a ground for ulterior legal proceedings (*prætoriæ stipulationes cautionales*). It was, as Bethman-Hollweg observes, through the gradual absorption by these prætorian investigations of the whole field of the administration of justice that the functions of the *judices* were finally superseded, and the *extraordinaria cognitio* of Diocletian's time introduced.

L. 2, D. (xlvi. 5). Bethman-Hollweg. ii. § 122.

But, whether conducting the whole investigation himself, or ascertaining and limiting the field of investigation for a subordinate court, there were two main avenues by which the Prætor succeeded in introducing the most widely diffused changes into the substance of the law. The first was a reference to a moral standard, distinct from the purely legal standard supplied by the rules of the ancient law; the second was the yearly legislation of the Prætor in his Edict, by which he adopted, or amended, as he pleased, the rules of law and practice which had been observed by his predecessor.

The notion of a moral standard of right, by which a judge should be guided, irrespectively of the rules of formal law, is always liable to produce uncertainty, and, therefore, anarchy, in the administration of law, unless it be carefully

hedged round by precedent, by another law, or by an exceptionally precise system of moral ideas. Such a notion seems to have been introduced to the attention of the Roman Prætor by the growing necessity of recognizing, as between foreigners in their dealings with one another, or as between foreigners and Roman citizens, some wider principles of law than the narrow, antiquated, and technical rules of the old Roman State. The obvious principles to select were those principles which seemed to be common to the laws of all States, the interests of whose citizens were usually involved, provided that, by some process of induction, they could be ascertained and generalized. To these principles, as they gradually emerged into view, was given the title of *jus gentium.*

The creation of a distinct Prætor for the determination of suits, for which this *jus gentium* must have supplied the rules of law, was an important step forward in the course of giving to this body of rules an independent existence side by side with the *jus civile.* But, apart from all consideration of the value of these foreign, but more general, rules of law in themselves, the mere fact of habitually travelling outside of the stiff rules of the civil law in search of broader principles, by reference to which practical justice could alone be done, must have broken the spell of the ancient law and have favoured the disposition to correct, supplement, and ignore it. It was probably not till near the days of Cicero that the notion of *jus gentium* began to be merged in that of a *jus naturæ,* or law of nature. It is certain, from repeated allusions in Cicero's writings, that the idea of a system of law based on the nature of man, and applicable, so far as its utterances are intelligible, not more to one State than to another, was, throughout the last century of the republic, perfectly familiar in the phraseology of the people, if not yet in that of the lawyers. It is thus not true that the Roman lawyers of the times of the Antonines borrowed the conception of a law of nature for the first time directly from the Stoic philosophy, though it is possible

Cic. de Leg. ii. 18, 16. Orat. ch. 37.

Lactantius Inst. vi. 8.

Maine's Anc. Law, ch. iii.

that the popularity of the stoic philosophy was favourable to the clear enunciation of the dictates of the law of nature by the most eminent jurists.

It is certain, however, that in the time of Gaius, the expressions, *jus gentium*, and *jus naturæ* or *naturale*, were convertible. Savigny has collected a number of passages from Gaius' writings which quite suffice to show that in his mind there were two branches of the law, and two only, that is to say, the *jus civile* on the one hand, and the *jus gentium* or *jus naturæ* on the other. Ulpian, indeed, in the passage with which the Digest commences, expressly calls law *tripertitum* and opposes *jus naturale*, the law common to man and the lower animals, to the *jus gentium*, the law which men in all countries use.

System des Heutigen Rechts Beylag. i.

L. 1, § 2, D. (ii. 1).

But this is obviously not an historical account of the mode in which the expressions grew up. It is the product of a later age of scientific reflection. The true account of the matter seems to be that the Prætor was first led to elaborate the *jus gentium* by the pressing necessity of daily administering justice in respect of transactions which had taken place in view of some other system of law than the severely technical law of the Roman state. In the process of formulating, by means of his Edict, as will shortly be described, the rules of law he held it to be expedient and just to apply, these rules gradually acquired a systematic form which, as a whole, presented a remarkable contrast to the still more systematic "civil" law.

At the same time it became apparent that this new and vital system was more consonant than the older one with the requirements both of abstract justice and of advancing commerce and civilization. So far as it was morally or judicially inadequate, there was nothing to prevent the Prætor from time to time from adjusting and completing it, and there was everything to stimulate him in doing so, and every facility to help him. It was no wonder, then, that the system of law which was then the characteristic product of the Prætor's spontaneous activity gradually lost the associations of its earlier origin and,

under the titles "Æquitas," "Jus Naturale," "Jus Naturæ," presented the face of a system co-extensive with a code of abstract morality. The new associations which the study of the Stoic philosophy, and other literary influences from Greece and other countries laid open by the Roman arms, were gathering round the term "nature" would, no doubt, do much to rivet and foster the notion that the dictates of abstract justice, as expounded by a competent judicial authority, were a true source of binding law. It is to be observed, that when the term *honorarium* was used in contrast to *civile* as an epithet of *jus*, it was meant that the law owed its force to the legislative capacity of the magistrate who administers it, as the Prætor or Ædile. This law would generally be co-extensive with the *jus gentium* and *jus naturæ*, but not exactly nor necessarily so.

See Puchta's Cursus, § 85.

The second method, by which the Prætor directly influenced the formation of Roman law, and which also acted as one chief medium for introducing the *jus gentium*, was the publication of his yearly edict. From the numerous allusions in Cicero's writings to the subject, and from the copious *verbatim* extracts from the Prætor's Perpetual Edict, which occur in the Digest, there is no part of the general history of Roman law which is better ascertained than that of the Edict. The habit of occasionally or periodically giving public notice of administrative rules, which would thereafter be applied, seems to trace back to the earliest ages of Roman history.

Gaius (i. 6) says generally that magistrates of the Roman people have (inherently to their office, as it would seem) the right of issuing an edict. Of course this habit or right became chiefly important in the hands of those magistrates to whose share the duty of administering public justice for one purpose or another chiefly fell. These were the Prætors, the Curule Ædile, and the Quæstors charged with the administration of a province. The nature of the Ædile's Edict can be sufficiently understood from the first title of the twenty-first book of the Digest, which is wholly devoted to its exposition, and from the lengthened extract from

the Edict itself contained in the opening citation from Ulpian's work on the subject. The sort of subject with which this Edict dealt, and in respect of which the Ædiles administered justice conformably to the terms of their Edict, were the commoner contracts for the sale of slaves and beasts of burden, the regulation of the public thoroughfares, the care of funerals, the construction of tombs, and the reduction of expense in respect thereof.

D. (xxi. 1). Hein. Hist. Jur. lxxvi. Cic. de Off. iii. 17.

Plant. cap. iv. 2.

Each of the Prætors, both at home and in the provinces, published a separate edict at the commencement of his term of office. The largest part of his Edict was borrowed word for word from that of his predecessor (*tralaticium*), though he usually incorporated new matter of his own (*novum*). The continuity of the successive officials, or the permanence of the year of office, gave to the whole edict the name of "*perpetuum.*" Sometimes serious complaints were made, especially in the provinces, that the Prætor did not, in the course of administering justice, adhere to the tenor of his own Edict, or that the published supplementary rules in the course of the year were at variance with the Perpetual Edict; and legislative measures were occasionally taken to compel them to do so.

Two of these have come down to us. The first was a *senatus consultum*, passed in B.C. 157, to the effect that "Prætors should administer the law in accordance with the terms of the Perpetual Edict." The second was a law (*lex*) passed by the tribune C. Cornelius in B.C. 66, amidst great opposition from the aristocracy, in the same terms as the previous *senatus consultum*. The variation from the terms of his Edict was one of the most serious charges which Cicero alleged against Verres just about this period. From this date, however, the terms of the Edict seem to have been more and more settled in all respects, as it was becoming a subject of general commentary. Servius Sulpicius, the friend of Cicero, wrote a treatise upon it.

Hein. Hist. lxxii., lxxiii.

L. 2, § 44, D. (i. 2).

It was in the reign of Hadrian, rather more than a century and a half after this time, that the Edict became in a still truer sense "perpetual," that is, unalterable. It seems that Salvius Julianus, who was at once an eminent jurisconsult and a Prætor—though his prætorian office is rather a matter of probable conjection than of certainty—was commissioned by the Emperor Hadrian to put the Edict into a final shape, suitable for use without further changes. It seems, too, from the way in which Justinian refers to the act of his predecessor in his preface to the Digest, that Hadrian completed it by a *senatus consultum*, with an address to the Senate, taking the form of an Edict of his own, to the effect that if it should appear that the Edict was insufficient to meet new cases, those cases should be decided by the emperor himself, in accordance with principles as closely as possible in analogy with those distinctly laid down in the Edict. It is interesting to notice that Salvius Julianus himself, before preparing the new Perpetual Edict, seems to have innovated constantly on the law as contained in the traditional Edict. Thus Julianus is quoted in more places than one in the Digest as having not only modified the older law, but modified it in a direction agreeable to his own Sabinian proclivities. It would seem that the *ædilitician* Edict was rendered truly perpetual at the same time.

A.D. 117.

De Confirm. Dig. § 18.

L. 3, D. (xxvii. 8). L. 7, D. (xl. 9).

Hein. Hist. § 277.

From this time it would seem to have become a decided principle in the administration of law that the "form" of the Perpetual Edict must be rigorously complied with, and that even the emperor himself—at any rate, in the earlier times—could not, in theory, grant a remedy, whether by appeal or otherwise in derogation of it. Such is a general outline of the historical fortunes of the Prætor's Edict. It remains to consider its contents and the mode of its influence on the formation of the law.

L. 13, C. (vi. 23). L. 2, C. (vi. 46). L. 2, C. (vi. 16). L. 2, C. (ii. 2). L. 7, § 2, D. (xlix. 5).

So many passages of the Prætor's Edict, in the form which it finally attained in the time of Hadrian, have been preserved, that it has been found possible, with no small

plausibility, to reconstruct the whole of the original document. Gothofred,[1] who follows the order of the Digest, and Heineccius,[2] who follows an order which he conceives to be internally probable, are especially distinguished for the bold attempts they have made in this direction. Whether the result, in either case, corresponds with historical truth or not, it affords, at least, the most effective mode of presenting at one view all the materials which are known to have entered into the construction of the Prætor's Edict. It will be found, on examining these materials, that while the form which the clauses of the Edict take throughout has relation to the grounds on which the Prætor would allow or refuse an action at law, or on which he would interfere by his extraordinary authority, yet the effect of these clauses is to introduce the most wide-reaching changes in the substance of the law. The Prætor, indeed, never by his Edict directly overrides an express statute, and, indeed, constantly upholds existing statutes by excepting cases to which they do not apply, or by giving increased protection to rights acquired under them.

[1] Edictum perpetuum a Salvio Juliano jurisconsulto compositum ad ordinem digestorum restitutum.

[2] Edictum perpetuum ordini atque integritati suæ restitutum.

It was in the region of the common civil law, as based partly on the letter of the XII. Tables, partly on the customary interpretation of them which had grown up, and partly on usages older than the XII. Tables themselves, or contemporaneous with them, that the Prætor's legislation made itself chiefly felt.

This older unwritten law was, much of it, obsolete, through changes in social circumstances, or harsh and unjust in its operation through an improvement in moral habits or ideas, or insufficient through the introduction of forms of property and of commercial intercourse wholly unlike those amidst which the law had grown up. Such was the conservative spirit of Roman lawyers and of the Roman people that it could not have been tolerated that the older rules of law should be transformed all at once by a stroke of legislation; or that even the Prætor should, by

ignoring them, have created remedies either outside of them or in direct contravention of them.

The Prætor, in fact, acted in a way entirely congenial to the most healthy sentiments of the day. He brought the law up to the requirements of the day, and satisfied the public conscience, without shocking the prevalent regard for antiquarian usage. He achieved this by the following notable methods. (1) He extended rights of action to a quantity of disputed claims which had never hitherto been regarded as matters of judicial consequence at all. Such an extension of jurisdiction was implied in the celebrated clause by which he gave a right of action in the case of every fair and honest engagement, even though none of the technicalities of a true legal contract were observed, and in the clause by which he gave a right of action to a person who managed the affairs of another person without any express or implied contract for the purpose.

L. 7, § 7, D. (ii. 14).

L. 3, D. (iii. 5).

Or (2) he conceded rights of action on grounds which, though not known to the civil law, were yet of a kind analogous to the grounds known to that law. This extension of jurisdiction covered all the *utiles actiones*, in respect of which the Prætor, in order to carry out the ends of practical justice, treated the plaintiff as though (*uti*) in a situation in which, in fact, he was not. Such was the *actio Publiciana* by which a possessor, who had not yet completed the full term necessary to complete his title by prescription, was treated already as an owner for the purpose of recovering possession from every one but the true owner. In the same way, after the Prætor had, by his Interdict, put a person in possession of a deceased person's estate, he could then sue for the specific articles in the character of a legal heir. So also the purchaser of the estate of a deceased person was enabled to sue in the character of the heir (*actio Serviana*), or in the character of the vendor or deceased, as the case might be (*actio Publiciana*). There is some doubt as to whether the term *utilis* is derived from *uti*, as, or from *utilis*, advantageous. Ulpian, who speaks of an *utilis actio* being given

Gaius iv. 34.

utilitatis gratia, would seem to favour the latter view; but the great jurists were not equally great etymologists; and the former derivation seems the more probable. L. 5, § 9, D. (xiii. 5).

(3) The Prætor restrained the use of the ordinary civil remedies in cases in which the moral claims or peculiar situation of particular classes of persons seemed to call for such special interference. It was thus that the Prætor forbade any one to sue, without his special permission, his ascendants or descendants, or his patron, and that he regulated the right of representation in suing, and that he reserved to himself the right, on inquiry made, to cancel every legal act which a minor under twenty-five years of age had done to his own disadvantage. L. 4, D. (ii. 4). L. 1, § 7, 8, D. (iii. 1). L. 1, D. (iv. 4).

But (4) the most important avenue of the Prætor's influence on the law was by the jurisdiction he gradually assumed and embodied in his Edict in respect of fraud. This constant reference to a capacity of moral discrimination inherent in the Prætor's office, coupled with a resolution to apply a purely moral test to all acts which admitted of it, is the most remarkable feature in the Edict, and that which imparted to it its most lasting weight. The notions of *dolus*, of *culpa*, of *bona fides*, and *mala fides*, which run through the whole Edict, presuppose not only that the Prætor is determined to submit to a rigorous test the mental conditions under which legal acts were performed, but that he actually has such a test, fitted with a finely graduated scale, ready to his hand, and is fully competent to apply it. Here was a principle wholly alien to the older civil law, in which intention and motive were persistently subordinated to precise compliance with rigid formalities.

This principle of moral inquisition was carried into effect in more ways than one. A large class of novel actions was allowed founded upon relationships rather of social confidence than of strict legal engagement. Such was the class of *bonæ fidei actiones*, including the special actions arising out of sale, hire, exchange, partnership, commission,

and other matters for which no action lay by the strict civil law (*actio de præscriptis verbis*). One peculiarity of these was, that the judge had a considerable latitude for discretion permitted him in appreciating all the circumstances and the special relations of the parties; another was that a penalty of "infamy" was attached to failure in making out a defence to the action. It need not be pointed out what vast changes in the substantive law this gradual usurpation of jurisdiction carried with it, nor what a delicate appreciation of mental and moral conditions the jurisdiction itself implied.

D. (xviii.), D. (xix.).

Another mode in which the Prætor, through his Edict, purported to exercise a faculty of moral inquisition, was, by according a right of defence, grounded on moral considerations, to those who would suffer practical injustice if the strict law took its normal course. The doctrine of "exceptions,"—by which a plea was allowed to be attached to the formula setting forth that, for reasons alleged, it would be inequitable to condemn the defendant,—supplied an astute instrument for meeting the devices not only of positive fraud but even of bad faith. "It often happens" (says Gaius) "that one is liable by the civil law, but it is inequitable (*iniquum*) that he should be condemned." It was by force of these "exceptions" that defences grounded on mistake, undue moral pressure, informal understandings, and the like, were entertained, whether as a temporary (*dilatoriæ*) or a permanent (*peremptoriæ*) bar to an action.

Gaius iv. 116.

It has already been noticed in what way the Prætor granted relief to large classes of persons peculiarly exposed to the solicitations of fraud. Such were minors, that is, persons above the age of puberty, but yet unexperienced in the world's ways; creditors, and absent persons, and the relations of a deceased who had been either overlooked or insufficiently provided for by a will. By one or other of his acts of extraordinary jurisdiction in some classes of cases he simply nullified acts which were good by the civil law; in other classes he absolutely transferred the possession of property from one person to another, and laid the ground

for the ripening of the new possession into ownership. In this way he overrode the most inveterate doctrines of the older civil law. It is thus seen how correct was the description of the "prætorian law" as given by Papinian, "which" (said he), "the Prætors introduced for the public good in order to aid, to supplement, or to correct the civil law." L. 7, D. (i. 1)

If it might have been apprehended that this enormous legislative power, which was inherent in the Prætor's office, would introduce an uncertainty and vacillation into the law which no actual improvements could compensate, it is to be remembered that the institution contained within itself its own checks and safety-valves. One of these checks is exhibited in an expedient devised by the Prætors themselves and embodied in the Edict, to the effect that if any magistrate, in discharging the functions of his office, laid down any principle, the same principle must be held valid in the case of an action being brought against the magistrate himself. L. 1, D. (ii. 2).

It is further to be noticed that the mere extent of the Edict rendered it obviously convenient for a magistrate coming fresh to his work to adopt it largely rather than to innovate; and that the shortness of the term of office of each particular Prætor gave a very faint chance of lasting validity to any change which had nothing else to recommend it than the Prætor's caprice. Then, again, the publicity of the Edict, which seems to have been publicly exposed to view on a white tablet in the Forum, and which the suitors inspected in person to ascertain the form of action or defence which was available for them, was wholly in favour of regularity and uniformity. Sudden changes must invite comment, and would probably occasion inconvenience. Hence a reason capable of being understood by all must be ready at hand. Then, again, the Prætor was not a jurisconsult by profession, though in particular cases, as in that of Salvius Julianus, he might chance to be one. He thus came to his office ready rather to learn than to teach, and eager rather to execute Hein. Hist. Edictorum, Lib. 1, cap. vi., § 17. L. 1, § 1, D. (ii. 13).

vigorously the laws as they were than to devise changes in them. The very novelty of the ground on which he was treading would make him disposed rather to err on the side of caution than of precipitancy. It is, indeed, probable that the actual modifications incorporated from time to time into the Edict had been gradually adopted in practice in order to remedy special cases of injustice before they were elevated into rules of law for the year of their formal publication. It thus appears rather surprising, considering the severely conservative habits of Roman lawyers and statesmen, not that the Prætors innovated so little, but that they innovated so much.

The gradual absorption of all legislative power, whether statutory or judicial, by the emperors, naturally led to the suppression of the functions of the Prætor Urbanus as a source of legislation; while the reconstruction of the provincial administration, and the increasing separation between the eastern and western provinces of the empire, which was taking place between the middle of the second and the end of the third century, all tended to divest the Perpetual Edict of its importance as a universal code. It was, no doubt, for a long time one of the leading written authorities of the law, and as such was constantly commented upon and reverently handled as a starting-point in statutory legislation. But the comments of authoritative jurists were of an importance equal at least to that of the text; and a rescript of the emperor could any day suspend or modify (though, apparently, not openly abrogate) its most familiar clauses. The Prætor became, at the same time, divorced from his Edict and degraded into an ordinary magistrate hemmed in on every side by the written letter of the law. The office itself was in existence certainly up to the time of Constantine, but the Prefect of the city was treated as a higher judicial officer. The degradation of the functions of the Prætor marked another significant change, the gradual abolition of the Formulary system. This was apparently brought about by two distinct causes, one, the superior convenience of requiring the magistrate (no longer the

L. 17, C. (vii. 62). L. 18, C. (v. 71).

dignified official of the republic), who presided over the proceedings, to take cognizance of them from first to last, without referring the case to another tribune; the other, the pettifogging distinctions which the abuse of the Formulary system had brought in its train, to the subversion of practical justice. The constitution of Diocletian (A.D. 294) abolishing the practice of referring matters to subordinate judges, except in the case of the urgent preoccupation of the superior judge, seems to point to the first of these causes. The constitution of Constantius (A.D. 343), for the suppression of the formulæ, as "laying snares for the acts of every one," seems to point to the second of these causes.

L. 2, C. (iii. 3).

C. (ii. 58).

§ 2.—*From the Suppression of the Formulary System by Diocletian* (A.D. 294), *to the Death of Justinian.*

The subject of this section is more conveniently treated in the chapter on Procedure. It is pointed out there that there is so unbroken a continuity between the earlier and the latest Roman procedure, that this subject must needs be treated after a more strictly historical method even than other parts of the law. It becomes then necessary, in order to introduce the system of procedure as it stood under Justinian's latest development, to revert in some detail to the whole course of Roman procedure from the first. This again necessitates repetition, but it will be avoided to some extent by deferring the completion of the history of judicial legislation between the time of Diocletian and that of Justinian to a later chapter, and there treating it once for all.

CHAPTER IV.

STATUTORY LEGISLATION AND CODIFICATION.

§ 1.—*Legislation during the Republic.*

In Rome, as in all other States, not only was the customary and unwritten law anterior to all express legislation, but when the habit of express legislation was fully formed, the occasions on which it was actually resorted to were, during a long period, few and far between. These occasions, indeed, were, at first, chiefly dictated by political or constitutional necessity, and were not the outcome of a comprehensive reforming spirit. Thus, in giving an account of the organs and methods of legislation in republican Rome, two difficulties have to be encountered. One is that of recognizing the place which statutory legislation occupied in relation to the unwritten rules and customs as usages in vogue, as well as to the ceaselessly progressing judicial legislation. The other difficulty is the discrimination of what belongs to the process of legislation, regarded from a purely juridical point of view, and what belongs to it as an instrument of political change.

It will be found that in early Rome, as in more modern States, it was out of an urgent need for political renovation—often expressing itself in revolution—that a conscious energy in the direction of the amendment of the rules of the customary law, or *jus civile*, developed itself. The XII. Tables themselves, regarded from this point of view, as a product of the temporary legislation of the decemvirs, are a remarkable instance of the stimulus to reform of the private law supplied by popular zeal for fresh constitutional securities.

Throughout the whole course of the republic, this intimate intermingling of general legislation with constitutional reform is conspicuous, and the comprehensive legal amendments in the later days achieved by the Gracchi, by Sulla, and by Julius Cæsar, are only specimens, on a wide scale, of a course of beneficial change which, during a long series of epochs, was incessantly at work. Though, politically and socially, the personal agent, whether consul or tribune, who inaugurated legislative measures by bringing them before the appropriate assembly, naturally fixes attention on himself, and, consequently, often gave his name to the new law, yet it is to the legislative organ itself that attention must be directed, if the logical history of Roman law is to be correctly expounded. This legislative organ is either one or other of the comitia or the senate.

At this point an initial perplexity presents itself to the historical student of Roman law. There is no doubt but that, through a series of exceptional proceedings, which will shortly be described, there were periods when, in theory at least, there were simultaneously in existence three if not four legislative bodies practically independent of each other, and yet each of them possessed of sovereign power. That no record is preserved of any purely legislative conflicts between the several assemblies, and that, in fact, at any given moment, the task of legislation was either absorbed by one of them or distributed on recognized principles between them, is an illustration of the way in which constitutional anomalies often vanish in practice before the presence of innumerable minute facts and influences, of which no account is taken in formal and technical descriptions.

In republican Rome, indeed, owing to the foreign wars, in which it was ceaselessly engaged, and the social emergencies, to the relief of which so much of its political activity was directed, executive action far surpassed legislative action in prominence and immediate importance. Hence the chief functions of the legislative assemblies, and those about which the only serious controversies and constitutional struggles arose, were concerned with the appointment of

the numerous officers of the executive. But, as to these tasks, the respective functions of each assembly were, at any given moment, clearly and sharply defined. Not, indeed, that no irregularities and usurpations occurred, but they were at all times known to be such, and proceeded, less from any indefiniteness attaching to the limits of any assembly's province, than from the overbearing influence of some particular person, or from the casual pressure of outward events.

There were three leading causes which severally determined, at different epochs, the quarter to which the plenary legislative authority was gravitating. The first cause was the chronic insurrection of the plebeians against the patricians, represented in the progressive development of the plebeian assembly, the *comitia tributa.* The second cause was the insurrection of the middle-class freeholders against the capitalists, represented in the reconstruction of the plutocratic assembly of Servius Tullius, the *comitia centuriata*, in such a way as to qualify the franchise of wealth by a franchise of residence. The third cause was the gradual overweening weight of the executive, which was represented, now by the legislative assumptions of the Senate, now by the influence of some demagogic consul or tribune over the multitudinous and disorganized assemblies which—become habitual—heralded the advent of the empire.

In order to appreciate the respective shares in legislation of the different assemblies at different epochs, it is necessary to travel over the successive steps by which the constitutional development was effected, but without dwelling on notorious historical facts, which belong rather to politics than to law.

At the outset of well-accredited history, that is about the time of the expulsion of the kings, or a little later, the only constitutional assemblies are the senate and the *comitia curiata.* The *comitia calata* resembled the *comitia curiata* in being, in fact, composed of exactly the same persons, that is, the heads of the patrician families. But, inasmuch as the people present took only a passive

part and were summoned (*calati*) by the priests for the purpose of witnessing public ceremonials—such as the reading of wills, the consecration of priests, the renunciation by an heir of sacred rites appertaining to his inheritance (*detestatio sacrorum*),—rather than required to respond actively to a proposition (*rogatio*) of public interest, these meetings belonged to the class of sectional or occasional gatherings (*conciones*) more than to that of organized political assemblies (*comitia*).

Such organized assemblies were the senate and the *comitia curiata*, in which latter the patricians, or descendants of the primitive population, were represented by the heads of families sitting together and voting according to the clan divisions called *curiæ*. Between the two assemblies—in concert, first, with the king, and afterwards with the various officials among whom the king's functions were distributed—the task of government, legislative and executive, was apportioned on principles clearly recognized. But the advancing attitude and growing numbers of the plebs, or class of the population which did not trace back,—or profess to trace back,—their descent to the primitive inhabitants of the city, introduced new and more difficult problems, the solution of which, however, might have been indefinitely postponed if the existing constitutional authorities had governed with any pretensions to justice and liberality.

The crisis was, however, precipitated by oppression, and an era of revolution was signified by the threatened disruption of the State implied in the first and second Secessions, by the extraordinary remedy sought, and, to some extent, found in the decemviral legislation, and in the passing of the Valerio-Horatian law of B.C. 449, which decisively elevated the assembly of the plebs (*comitia tributa*) into a component—if not, as yet, co-ordinate—part of the national legislature.

The steps of this important development may be noted as follows. From times almost indefinitely remote it would seem that the plebs held informal assemblies of their own for the management of such business, secular or religious,

as concerned them exclusively in contradistinction both to the patricians and to the people as a whole. These primitive assemblies belonged to the class of *conciones*, therein resembling the *comitia calata* of the patricians, rather than true *comitia;* though in their original constitution, which seems in the matter of voting to have followed the clan organization of the *comitia curiata*, they presented a close parallel to the patrician assemblies.

The first distinguishable epoch of constitutional change is denoted by the passing of the *lex publilia*, B.C. 471. This law probably only gave outward constitutional efficacy to actual changes which had been brought about by long and silently operating causes. The purport of the law seems to have been two-fold; first, that of recognizing a transmutation which had already taken place of the character of the plebeian assembly, from being a body largely under the influence of the patricians, through their clients, to being a representative assembly of the middle-class freeholders. This change was signified by the voting taking place by tribes instead of by clans. A redistribution of the people and the tribes seems to have accompanied the reform, for the purpose of carrying it out more thoroughly.

Liv. iii. 30. Dion. Antiq. Rom. ix. 43.

With the extension of Roman territory since the reforms of Servius Tullius, the number of tribes had multiplied from four to twenty-one; four including the residents in the city and its suburbs, and the remainder the residents in the country. The voters in all these tribes were exclusively freeholders, and, as Mommsen says, "voted without distinction as to the size of their possessions, and just as they dwelt together in villages and hamlets." Thus from these newly constituted assemblies the great majority of freedmen and the clients of patricians were excluded as having no land; and, even if Niebuhr's and Mommsen's view, that the patrician freeholders were excluded likewise, is incorrect, the influence of the patricians in the seventeen country tribes must henceforth have been diluted to an indefinite extent. A second provision of the *lex publilia* was that a resolution of the comitia of the plebs, hence-

forth called the *comitia tributa* was put upon the same level of constitutional efficacy as a resolution of the general comitia of the people, introduced by Servius Tullius, and styled *centuriata.*

It is certain that the assent of the Senate, as recognizing the constitutional validity and public policy of the proposal from an executive point of view, was still needed ; and it must also be concluded that the *comitia tributa* might be expected to confine their legislation to the same class of matters, of tribal or of purely plebeian interest, to which the plebeian assembly had always confined itself. The extension of the field of legislation to all the matters to which the *comitia centuriata* addressed themselves, together with the release of the plebeian assembly from the interposition both of the general popular assembly and of the senate, were later but imminent achievements of successful agitation or revolution.

It is obvious that the reconstitution of the plebeian assembly on a basis of residency and land tenure, in the stead of the original basis of clan relationship alone, tended to obliterate the distinction, for the purposes of the assembly, between plebeian and patrician, while it raised up side by side with the other assemblies a rival legislative organ of a not less broadly popular constitution than the *comitia centuriata*, the influence exerted in this latter by the wealthy patrician being considerably less in the reformed *comitia tributa.* The further steps towards the attainment of full and independent legislative power by the *comitia centuriata* are marked by the—

Aul. Gell. xv. 27.

(1) Lex Valeria Horatia, B.C. 449.
(2) Leges Publiliæ, B.C. 339.
(3) Lex Mœnia, B.C. 287.
(4) Lex Hortensia, B.C. 286.

(1) The terms of the first of these laws (*lex Valeria Horatia*) were: "That what the plebs enacted, sitting as an assembly of the tribes (*tributim*), be binding as law for the whole people."

Puchta i. § 56. Liv. iii. 55.

(2) The terms of one of the *leges Publiliæ* were:

"That resolutions of the *comitia tributa* (*plebiscita*) be binding on the whole Roman people (*omnes Quirites*)." The terms of another of these laws were: "That in the case of laws proposed in the *comitia centuriata*, the Senate should announce their approval before the voting took place" (*ante initum suffragium patres auctores fierent*).

Puchta i. 59.
Liv. viii. 12.

(3) The terms of the *lex Mænia* seem to have been to the effect that the Senate should, by anticipation, authorize (*auctores fieri*) a plebeian consul to be nominated for election.

Cic. Brutus 14.

(4) The terms of the *lex Hortensia* were to the effect that "the law which the plebs enacted should be binding on the whole Roman people" (*ut eo jure quod plebs statuisset omnes Quirites tenerentur*).

Aul. Gell. xv. 27.
Plin. Hist. Nat. xvi. 15.
Gaius i. 3.

On a cursory glance at these several enactments—of which only the briefest account is given in the historical sources—extending over a period of one hundred and fifty years, it might seem that the first went as far in constitutional reform as the last, and the last, the *lex Hortensia*, did nothing more than give the efficacy of iteration to principles long asserted, but hitherto only weakly maintained in actual practice. In default of precise constitutional history, dealing with the point, recourse must be had, partly, to the known relations to each other at different epochs of the various constitutional assemblies and, partly, to conjecture, based on a review of the political situation as extended over the whole period under consideration.

There is no doubt but that after the passing of the last law of the series, the *lex Hortensia*, resolutions of the *comitia tributa* were, for all purposes whatsoever, placed on the same level in respect to constitutional efficacy for compelling the obedience of the whole people, as laws duly passed in the *comitia centuriata* (*plebiscita legibus exequata sunt*). But this could only have meant that the plebeian assembly was exempted from all control and interference on the part of the general assembly, and not that either assembly was competent to encroach on matters which,—it

will shortly be seen,—belonged exclusively to the senate. The Senate, however, was by this time obliged to decide on the constitutional validity of a proposal in either assembly and on the competency of the assembly, before the voting took place, and not afterwards. Thus the "authorization" on the part of the Senate of a proposal in either assembly was held only to extend to technical propriety and formality, and not to imply its acquiescence on the merits.

Bearing this in mind as the constitutional goal finally reached, it is not difficult to conjecture the steps by which the course was travelled over, from the merely sectional and local competency of the *comitia tributa* to its plenary equalization with the *comitia centuriata* as a legislative body for the whole State.

The *lex Publilia* of B.C. 471 gave to the resolutions of the *comitia tributa*, when confining themselves at least to their usual local or sectional affairs, the force of laws binding on the special persons concerned, and demanding the respect of the whole people.

The *lex Valeria* of B.C. 449 extended the competency of the *comitia tributa*, in the matter of legislation, to all matters whatever which could come before the *comitia centuriata;* but a resolution of the *comitia tributa* could only be converted into law by a subsequent motion proposed and carried in the *comitia centuriata*, followed by the assent of the senate.

The *leges Publiliæ* took a momentous step in actually liberating the plebeian assembly from the control of the other bodies, by enacting that resolutions of the *comitia tributa* (*plebiscita*) should have full and universal legal efficacy, without being converted by the co-operation of the *comitia centuriata* into formal laws (*leges*). The assent of the Senate was still presupposed; but the quality and objects of that assent were undergoing change, as is obvious from the simultaneous enactment that it was henceforth to precede, instead of following, the vote on a law in the *comitia centuriata.* There was thus left an anomaly in the fact of the subsequent assent of the Senate being required

to the resolution of the plebeian assembly, though no formal law had to be enacted on which the assent of the Senate would alone be technically based.

The *lex Mœnia* and the *lex Hortensia* removed this anomaly and gave an emphasised expression to the changed relationship of the *comitia tributa*, to the *comitia centuriata*, and to the *senate*. The legislative authority of the *comitia tributa* and the *comitia centuriata* were henceforth co-ordinate and co-equal.

It is at this point that the question naturally suggests itself as to how these two parallel legislative bodies kept clear of embarrassing conflicts with one another, or as to how they distributed the task of legislation between themselves. The question belongs primarily to constitutional and political history, though, for the purpose of giving a continuous account of the organs of statutory legislation at Rome, it cannot be avoided in a purely juridical treatise.

It is to be remembered that the *comitia tributa* and the *comitia centuriata* were not, like modern "chambers" or "houses," composed of persons, whether of a representative character or not, who can in no case be the same for both assemblies. From the nature of the organization of the two Roman assemblies, according to their primary constitution, a large proportion of the members of each assemblage was composed of identically the same persons for both. Though at no moment in their history could the two assemblies be composed of exactly the same members, differently organized for voting purposes.

But the fact that, in course of time, when the powers of the two assemblies were co-ordinate, the bulk of the component members was the same for each assembly rendered the choice of the assembly in which a particular measure should be proposed a question rather of technical convenience, in view of the facility of getting the measure through its formal stages, than of political prudence. It was not, however, without some statesmanlike efforts, extending over several years, that the influence of accumulated wealth in the *comitia centuriata* was restrained, and the people distributed and re-distributed into tribes and centuries in

such a way as to keep the authority of the two assemblies really on a par.

These efforts stretched over the period between the censorship of Appius Claudius, in B.C. 312, and an uncertain date posterior to B.C. 241. The persons who had to be distributed belonged either to the class of freedmen or to that of citizens, and, in conformity with the original distinction between the local and the plutocratic organization represented by the two assemblies respectively, each class was treated as composed of those who had land and of those who had no land. A further distinction was introduced between those who held land beyond a certain value and those who held land under that value.

Mommsen, i. P. 339.

According to the reform of the censor Appius Claudius in B.C. 312, a citizen who had no land was received into whatever tribe he chose, and then, according to his means, into the corresponding century. Thus in the centuries the position of freeholders and non-freeholders of free-birth was equalized; but freedmen not belonging to any tribe, membership of one of which was now the only avenue to the centuries, were disfranchized altogether. This was one blow at the influence of mere wealth, which was being accumulated in the hands of patrons who exercised over their impecunious freedmen an overwhelming political influence.

But the reform proceeded further in the hands of Quintus Fabius Rullianus, Appius Claudius' immediate successor in the consulship, B.C. 304. The four city tribes were postponed in order and dignity to the rural tribes, which, having been reduced to seventeen by the wars with Porsenna, had now again increased to thirty-one. Into these thirty-one rural tribes were admitted (1) citizens who were freeholders of land, and (2) freedmen who had land above the value of 30,000 sesterces (about £300). Into the four city tribes were admitted (1) citizens who had no freehold land, and (2) freedmen with land under the above value. All other freemen were, or continued, disfranchised.

The result of these reforms was obviously to extend

vastly the influence of the middle-class freeholder, whatever the amount of his wealth, to reduce the direct voting power of the wealthy citizen who had no land, and to disfranchise all those who were peculiarly exposed to the influence of the wealthy capitalist.

The reforms were completed by a further change, the exact history and nature of which can only be conjectured from its undoubted results. A reconstitution of the *comitia centuriata* took place, of such a kind as to distribute the centuries among the tribes, or rather, perhaps to divide each tribe into ten classes of centuries, five of the "seniores" and five of the "juniores." The right of priority in voting was withdrawn from the *equites* and transferred to a voting division chosen from the first class. The same number of votes was conceded to each of the five classes, so that even if the first class were unanimous it was only by the voting of the third class that the majority was decided.

It seems uncertain what part the new tribal organization played in the re-constituted centuries. It is possible that there was some mode of taking the vote of a tribe, as either constituting ten divisions of centuries, and so determining the votes of those divisions all down the line of classes successively polled, or as merely directing and influencing the votes of those divisions. Anyway, the result was in the same direction as the reforms already noticed which proceeded almost contemporaneously, and tended to qualify the voting power and political influence of the moneyed capitalist by raising up a rival in the middle-class freeholder.

From this account it will be clear why, from this time forward, most of the legislation took place in the *comitia tributa* rather than in the *comitia centuriata;* in other words, *plebiscita* were more frequent than *leges.* Inasmuch as the people were polled according to their tribal organization in both *comitia,* it was simpler to be content with the expression given in what was now the body with the simpler apparatus. As Mommsen says, that "elections, proposals of laws, criminal charges, and, generally, all affairs requiring the

See Comitia, Smith's Dict. Antiq.

Puchta 1, § 61. Liv. i. 43.

co-operation of the burgesses came to be uniformly brought before the *comitia tributa*; and the more unwieldy centuries were seldom convoked, except when it was constitutionally necessary to do so for electing the censors, consuls, and prætors, or for decreeing an aggressive war."

There were, furthermore, some special facilities presented by the simpler practical machinery of the *comitia tributa* as compared with the *comitia centuriata*, though many of the arrangements for taking the votes were the same for both assemblies. The plebeian assembly might be held anywhere within or without the walls, provided the distance was not more than a mile from the pomœrium. The *comitia centuriata*, which reproduced the ancient organization of the people in military fashion (*exercitus*), could only assemble outside the walls and, in fact, habitually met in the Campus Martius. For a meeting of this assembly, and also (though not, it would seem, in the earlier time) for a meeting of the plebeian assembly, it was indispensable that the auspices should have been taken the first thing in the morning and declared favourable, and no meeting could proceed if thunder or lightning or a storm occurred. For the purpose of observing the heavens (*servare de cœlo*) a law or laws were enacted (B.C. 156) to enable any of the superior magistrates to do this on the day on which either assembly met, and if they saw lightning to report to the presiding magistrates. Cicero regarded this legislation as a security against democratic tyranny (*propugnacula et muros tranquillitatis et otii*), inasmuch as they put it within the power of any magistrate to stay the proceedings of the popular assemblies. These laws were practically repealed or suspended by Clodius and Cæsar for obvious reasons.

Cic. In Pis. 4.

The voting in both assemblies was by ballot, in accordance with a series of laws called the *leges tabellariæ*. It was the *lex Papiria*, B.C. 131, which chiefly related to legislation and provided that the ballot should be introduced *in legibus jubendis ac vetandis*. The mode of taking the votes was as follows, it being

Cic. de Legg. iii. 16.

remembered that the method varied at different times and is by no means out of the reach of controversy.

A temporary (or, in later times, in the Campus Martius, a permanent) enclosure was constructed for containing the whole of the voters. It was divided into narrow compartments large enough to contain all the voters belonging to a tribe or class of the centuries. These chambers or lobbies were entered and left by passages called *pontes* or bridges, and at the points of entrance and egress vessels or ballot-boxes (*cistæ*) were placed. When a tribe or century was called upon (by lot, as it was in later days settled) to vote for or against a proposed law, each voter, as he entered the lobby of his class or tribe, received out of one of the vases at hand two tickets, marked V. A. (*uti rogas*, Aye) and A (*antiquo*, for the existing state of things, No) respectively. On passing out of the lobby he dropped one of these into the vase at the extremity of the passage or "bridge" of egress and so recorded his vote.

Certain officers (*rogatores*), who in old times used to "ask" a voter his opinion, collected the tablets and gave them to other officers—who may have been the *diribitores*, unless the officials who originally gave a voter his voting tablet were so named—and these counted them, and, after being further checked, the number of votes either way was reported to the presiding magistrate, who declared (*renuntiavit*) the result to the bystanders, and made it known at a distance by means of public criers (*præcones*). When the whole of the tribes or centuries had voted, the aggregate result was similarly declared.

It is to be observed that both comitia were summoned by a written proclamation, issued by the consul or magistrate who would preside. It had been long customary that this notice should be given at least a *trinundinum*, that is, seventeen days or three market-days inclusive beforehand. By the *lex Cœcilia Didia*, B.C. 98, the interposition of this space of time was rendered compulsory. The public notice was called *promulgatio*. The president usually recommended the measure himself if he proposed it, and he might accord to others permission to speak for or against it.

When the subject had, in the opinion of the president, been sufficiently discussed, he called upon the people to prepare for voting by the words, "*Ite in suffragium, bene juvantibus deis.*" If the number of citizens present at the assembly was thought too small, the decision might be deferred till another day; but if each century was represented by only a few citizens, the voting was proceeded with.

Smith's Dict. Antiq., Ramsay's Manual of Roman Antiq.

Besides the comitia, the Senate was not only, during the earlier period of the republic, a component part of the legislature as represented for one purpose or another by either of the two competing comitia, but gradually became an independent representative of the legislative authority; that is, towards the close of the republic, resolutions of the Senate (*senatus consulta*) were held to be equivalent to laws. The reality of this fact is unquestionable, though the simple cause for it assigned in Justinian's Institutes and by Pomponius at the beginning of the Digest (L. 2, § 9, D. (i. 2)) was, of course, a very superficial account of a change which extended over a long period, and was not effected without many constitutional struggles. The account given by Pomponius is, that the numerical increase of the people prevented their meeting in one place without turbulence, and, consequently, the Senate interposed, and "what it ordained obtained the force of law and was called a *senatus consultum.*" The chief steps by which the executive senate attained legislative authority on a par with, and, at the beginning of the empire, to the exclusion of, the other constitutional assemblies, seem to have been the following.

First, the confessedly executive functions of the Senate were held to entitle it to impeach the constitutional validity of statutes purporting to be enacted by either comitia, especially on the ground of religious irregularity or informalities. This refusal for causes assigned and understood to recognize a professed enactment of a legislative assembly passed insensibly into a practice of simply refusing to recognize a law passed from mere arbitrary political motives. The Senate was in both these cases said to "abrogate" the law.

The next step was for the Senate to refuse the necessary executive machinery to carry a particular clause or series of clauses in a statute passed by the comitia. The Senate was then said to derogate from (*derogare*) law. A further step was for the Senate to give, through the medium of the executive magistrates under its control, legislative effect to one of its own decrees.

These steps are described, not very systematically perhaps, in the following fragment from Cicero: "There are, in all, four ways in which the Senate may, in accordance with precedent, affect legislation. One is to pass a resolution that a law should be abrogated. Another way is to declare that the people are not in fact bound by what, so far as form goes, purports to be a law. The third is by "derogating" from a law, to which method *senatus consulta* are often due." The fourth way, not included in the fragment, was the practice of granting a general or particular dispensation from the operation of a law. This law was finally repealed, in whole or in part, by means of an auxiliary law carried in the comitia in consequence of a resolution of the Senate to that effect—*ut de eâ re ad populum ferretur.*

Cic. Fr. Apud Ascon. Orell. p. 67. Puchta i. § 75.

The practice of exempting an individual person by *senatus consultum* from the operation of a law was regarded as a stretch of prerogative; and a proposal for a law was made in B.C. 67 by the tribune C. Cornelius to render the practice of issuing senatorial dispensations illegal—*ne quis nisi per populum legibus solveretur.* It seems, however, that C. Cornelius had to rest content with an enactment that, for the exercise of a dispensing power (thereby acknowledged to exist), two hundred senators at least must be present at the meeting of the Senate which agreed to it.

With respect to the gradual assumption of legislative functions by the Senate and to its recognized province under the republic, the following passage from Mommsen's history may be suitably cited: "Every new project of law was subjected to a preliminary deliberation in the Senate, and scarcely ever did a magistrate venture to lay a proposal

Mömmsen's Hist. (Eng. ed.), 1868, i. 349.

before the community without, or in opposition to, the Senate's opinion. Administration, war, peace, alliances, founding of colonies, assignation of lands, building and finance, execution of laws, and absolution in urgent cases, and even the elections, as depending on the magistrates, belonged theoretically or practically to the Senate."

§ 2.—*Legislation under the Empire.*

It was in great measure the thorough disorganization of the comitia and the Senate which, after severe struggles of rival factions and candidates for supreme dominion, gave the empire to the Cæsars, who, on the whole, were the most effective representatives of combined military strength and political astuteness. Consequently, when Augustus had firmly settled himself in his imperial seat, it was necessary for him either to reconstitute the Senate and decomposed assemblies and conduct the legislative and executive tasks of government with their help, or finally to dispense with all the republican institutions and to create new organs of government more or less directly dependent on himself as best suited to the new era. Augustus and his successors up to Justinian gradually passed from the first of these methods to the last.

At first the republican organs of legislation were merely controlled and reduced to an orderly condition, the only difference being the fact of the inordinate influence of the anomalous personage who, as "imperator," was for the present content to personate some of the old republican magistrates. Afterwards the republican institutions gradually fell away or expired from the effects of patronage and inanition, and the emperor, through the medium of a highly organized bureaucracy, undertook the whole task of legislation himself.

It was to the Senate, as the standing, though now effete and demoralized, representative of the executive authority, that the emperor at first mainly looked for co-operation in the work of government. At first Augustus declined

to be either consul or tribune, either of which offices would have entitled him to propose laws in one or other of the comitia. But, as Merivale says, "he retained the substance of either office by the anomalous *potestas* which he had caused to be conferred upon him." Augustus indeed confined himself to a permission to propose only one single measure at any sitting of the Senate. But at a later period this right was expressly conferred upon the emperor under the name of *jus relationis*, and accordingly as the right entitled him to introduce three or more subjects, it was called *jus tertiæ, quartæ, relationis.* The emperor introduced his proposals to the Senate in writing (*oratio, libellus, epistola principis*), which was read in the Senate by one of the quæstors. The latter were styled, for the purpose of discharging this function, *candidati principis.* Gaius alludes to the influence of the emperor on the laws enacted by the Senate when he says, "In consequence of a communication received (*ex oratione*) from the Emperor Hadrian, a *senatus consultum* was passed." So also Paulus is cited in the Digest as referring to a communication (*oratio*) of the Emperor Marcus Antoninus on which a *senatus consultum* was based (*senatus consultum secutum est*).

Hist. of Rom. under the Empire, iii. ch. 31. Smith's Dict. of Antiq. *Senatus.*

Smith's Dict. *Orationes Principum.* L. 1, § 1, D. (i. 13).

Gaius ii. 285. L. 16, D. (xxiii. 2).

From the time of Augustus to that of Septimius Severus, at the end of the second century, the Senate gradually assumed, under the emperor's control as just described, the position of the supreme and exclusive legislative authority; so much so, that not only were *senatus consulta* frequently named, like the old formal *leges*, after the proposer of them (as, for instance, in the case of the *senatus consultum Silanianum*), but the names of *lex* and *senatus consultum* seem to have been used interchangeably. Thus Gaius, after describing the purport of the *senatus consultum Claudianum*, refers to it a few lines further on as *ea lex.* Indeed, it has been noticed that there is no instance of a *lex* formally passed later than Nerva, at the end of the first century; though

Gaius i. 84.

this has been controverted in favour of an alleged law of Trajan's mentioned in a rescript of Diocletian. The most frequent recorded use of *senatus consulta* is between the reigns of Claudius and Septimius Severus; that is, between the middle of the first and the end of the second century. No *senatus consultum* is mentioned as passed after the time of Septimius Severus.

Puchta .§ 106. L. 3, C. (vii. 9).

The question as to what was the source of the exclusive legislative authority of the emperor is one which has excited some controversy, and the presumed answer to it has gone some way to associate in many people's minds the idea of the civil law with that of absolutism. In fact, Fortescue in his work, "De Laudibus Legum Angliæ," has a special chapter devoted to proving that, whereas by the civil law the king is above the law according to the doctrine, *Quod principi placuit legis habet vigorem*, in England the law is above the king.

Of course it is true that by Justinian's time, and even long before, the old republican and early imperial organs of statutory legislation, the comitia and the Senate, had been absorbed by the centralized executive machinery of the empire. But the very complication of this machinery, and the enormous administrative organization through which it worked, rendered the task of legislation something very different from that of merely recording the capricious changes of mind of a succession of individual men however exalted. A passage of Justinian's Institutes, written in an over-courtly spirit, is the origin of the misconception. This passage refers to an alleged *lex regia*, which the author of the clause says was carried with reference to the emperor's supreme executive authority, and by which the people conferred upon him all the supreme right of command (*imperium et potestatem*) which belonged to themselves. The existence in imperial times of any so-called *lex regia*, in the sense of a law reproducing the ancient *lex curiata* (called "*vetus lex Regia*" by Livy), which invested each king in succession with his kingly authority, is mythical. It is almost suffi-

Liv. xxxiv, c. 6.

ciently disproved by the omission of all allusion to it in the corresponding passage of Gaius's Institutes, in which he alludes to the fact that the emperor received his right of supreme command (*imperium*) by force of law (*per legem*).

Gaius i. 5.

Nevertheless there seems no reason to doubt that by a *senatum consultum*, followed,—so long as the *comitia* existed,—by a formal law, a variety of powers and exemptions were specially conferred on the reigning emperor. It is to this that the celebrated passage in the Code from a constitution of Alexander Severus refers, which says, "Although the law relating to the supreme executive command (*lex imperii*) discharges the emperor from the duty of complying with legal formalities (*solemnibus juris*), yet nothing is so suitable an attribute of the imperial authority as to live in compliance with law."

Tacitus, Hist. iv. 3.

L. 3, § 1, C. (vi. 23).

An interesting light upon this law (*lex imperii*) was thrown by the discovery of the terms of it, as it would seem, on a brazen tablet, at Rome, in 1342, during the pontificate of Clement VI. From the terms of the law as written on this tablet, it would seem that it was customary to re-enact the law in almost, but not quite, identical terms at the outset of each reign. Thus it resembled in some measure the English Treason statutes, and statutes relating to the civil list and coronation oath, which have often been passed on a king's or queen's accession, in a special form peculiar to the reign, but in close conformity to precedent, and worded according to a familiar type. The purport of the law in question is to confer on the emperor Vespasian all the powers, prerogatives, privileges, and exemptions which had been previously conferred on the emperors Augustus and Tiberius, and on his other predecessors. Among the rights conferred are those of bringing a matter before the Senate and having it put to the vote (*relatio*, *discessio*), and among the exemptions is that of being released from the obligation to obey the same laws and *plebiscita* as his predecessors.

Ortolan i. 354. Orelli Inscrip. Lat. i. p. 567.

If this remarkable document, the genuineness of which can hardly be disputed, was, even in Vespasian's day, an antiquarian curiosity, and did anything more than preserve a fast dying out reminiscence of a time when all authority, legislation, and executive, proceeded directly from the people, it throws a flood of light on the mode in which the legislative functions of the emperor progressed from point to point, and on the place they took in the constitution of Vespasian's time.

It appears at once that the notion of the emperor being above the law is repudiated rather than admitted. The people represented in the comitia are still regarded as the only source of law and as the supreme political authority. Each emperor in turn is individually and particularly exempted from the obligation to obey specified laws. The same expression (*legibus solutus*) had been used, as Merivale notices, when a candidate for public honours was allowed to compete for a magistracy before the legal age; when a general obtained leave to enter the city before the day appointed for his triumph; or when a prætor requested permission to absent himself more than ten days from the city. No doubt, however, the term "*solutus*" was a perilously loose one, and soon lent itself to indefinite constitutional extension.

Hist. i. xxxi.

This topic naturally leads on to the consideration of the various modes in which the emperor exercised his legislative power, as he became freed from restraint or competition on the part of the Senate and the popular assemblies.

The law which proceeded directly from the imperial authority, without the interposition, even of a formal kind, of any constitutional assembly, was comprised in a general class styled *constitutiones*. Thus Gaius defines a *constitutio principis* to be "what the emperor has enacted (*constituit*) either by his decree, by his edict, or by his letter." He goes on to say that it has never been doubted but that that obtains the force of law. A passage

Gaius i. 5.

of Ulpian, reported in the Digest, and which partially appears in the Institutes of Justinian, expounds in rather more detail what was comprehended under a *constitutio*. "Whatever the emperor has determined (*constituit*) by his letter and signature, or has decreed as a judge, or has responded in an interlocutory fashion at an informal session (*de plano interlocutus*), or has given as instruction by an edict, is undoubtedly a law; and all these (acts of legislation) are vulgarly comprised under the term *constitutiones*."

L. 1, D. (i. 4). 6, J. (i. 2).

The leading classes of *constitutiones* were (1) edicts, (2) decrees, (3) rescripts, and (4) mandates. These must be described in order.

(1) The *Edict* was naturally evolved, by the laws of historical continuity, out of the edicts of the Prætor and ædile known to the republic. It was issued by the later emperors, no longer merely, as at first, in the exercise of a magisterial and executive authority, but, ostensibly, as law for the whole empire. The significance of the emperor's edict thus made it important to distinguish between imperative rules intended to be personal or partial in their application, and those intended to be general laws. The tests of a law in the form of an edict are thus given in an edict of Theodosius II. and Valentinian III. It must either bear the name of an *edictum*, or *generalis constitutio;* or must be communicated to the Senate by an *oratio;* or must be circulated throughout the provinces as a generally binding law; or must contain expressions on the face of it which point to its being of general and not of only individual obligation (*expressius continere quod principes censuerint ea quæ in certis negotiis statuta sunt similium quoque causarum fata componere*). Thus it did not invalidate the generality of the obligatory force attaching to an edict that it was issued in compliance with a request proceeding from some special quarter, or by way of guiding a court of justice with reference to some pending litigation (*quod lis mota legis occasionem postulaverit*). Savigny notices that,

L. 3, C. (i. 14).

Savigny System, chap. iii. § 23.

"by far the most numerous imperial laws, namely those of Justinian, were addressed to some functionary," as, for instance, the "*præfectus prætorio.*"

(2) *Decrees.* The decrees of the emperor sitting as supreme judge of appeal, or as deciding by interlocutory order a point referred to him during the progress of a cause, were influential as sources of written legislation in two ways. In the first place, the judicial decisions of a high court were at all times proofs of what the law was. For this reason collections of imperial decrees were made by jurisconsults. Such were the three books of decrees by Paulus; and Savigny further instances the collection by Dositheus of the decrees of Hadrian. Similarly, simple decrees gave occasion for the formation and recognition of new legal positions. Thus the jurist Callistratus is quoted in the Digest as basing on a decree of Marcus Antoninus, in reference to a special case, the general rule that a creditor loses his right of action if he makes an illegal entry on his debtors' property instead of bringing an action in the usual way. L. 7, D. (xlviii. 7).

In the second place, legal force was expressly given to imperial decrees by Justinian, before whose time a decree had only force directly in the special case. The limits of this process are marked in the following passage, from a constitution of Justinian's, taken in connection with an earlier law. "If his majesty, the emperor, examines a cause judicially, and, with the parties both before him, delivers judgment, all inferior judges should take notice that the decision settles the law, not only for the particular case which called it forth, but for all analogous cases." In a previous passage of the Code, citing a constitution of Theodosius II. and Valentinian III., it is said that where the decision is, as it were, one-sided, that is, without the presence, actual or implied, of both the parties as formal suitors, the law applied in the special case is not to be extended to any parallel case. This marks the limit of the law of Justinian. L. 12, p. 1, C. (i. 14). L. 12, C. (i. 14). L. 3, C. (i. 14).

(3) *Rescripts.* There were three chief modes in which the emperor responded to inquiries on points of law which might be proposed to him. The reply might be given on the margin of the letter received (*adnotatio, subscriptio*), in a separate letter (*epistola*), or in a solemn and formal despatch (*pragmatica sanctio*). The last form of reply seems to have been usually, if not exclusively, resorted to when the application was made by, or on behalf of, a corporation, province, provincial senate, or aggregate body of persons associated for a public purpose.

L. 7, C. (i. 23).

On a careful comparison of the numerous rescripts mentioned in Justinian's compilations, and a review of the express legislation respecting them, it is Savigny's opinion that the operation of rescripts might be summed up in these rules: (1) They had legal force for the single case which occasioned them; (2) they had not legal force directly for any other case; (3) they operated for other cases with the force of a great authority.

System. Sect. xxiv.

These rules are illustrated and explained by the opposed facts that, on the one hand, Justinian, in his 113th Novell expressly forbids judges to apply legal decisions made in imperial rescripts, even of the most formal kind, to new cases, in qualification of general rules of law; while, on the other hand, it had long been the fashion to make collections of rescripts in the form of books, of which Savigny cites, as an example, the "Twenty Books of Constitutiones" by Papirius Justus, and the Gregorian and Hermogenian codes. The "Semestria" of D. Marcus were also half-yearly collections of important rescripts as well as decrees.

Nov. cxiii. 1.

Particular precautions had to be taken against falsification or fraud in the manufacture of rescripts, or against their mutilation; also against rescripts granted upon an allegation of false facts, or found after being granted to be opposed to recognized legal principles, or to the interest of the state (*generali juri vel utilitatæ publicæ adversa*). Owing to the extent of the empire, and the distance of many provinces from the seat of government, these casualties might easily occur.

For the prevention of fraud or falsification special care was taken, and precise methods of testing the genuineness of the rescripts were prescribed. Thus the original had to be produced, bearing the properly authenticated signature of the emperor; the date and year had to appear on the face of it; the colour of the ink and the nature of the substance to be written upon were exactly indicated. All rescripts resting on false allegations of fact, or found to be in violation of the public interests or common law, were *ipso facto* invalid. This last provision must have opened out the way to an almost indefinite amount of argument whenever a rescript was produced in court. L. 3, 4, 6, C. (i. 23).

(4) *Mandates.* Mandates, or instructions to public officials, usually the emperor's "Legates," though, undoubtedly, a source of imperial legislation, were not included in the list of sources enumerated above by Gaius and Ulpian, because of their limited importance, or because their efficacy was, at first, restricted to the particular province, the officials of which they primarily concerned. Subsequently, however, they undoubtedly obtained a wider influence, owing to the increased centralization of the government; but this influence might, no doubt, be restricted by special limiting words, or by the obvious peculiarity of the case. Most of the mandates of which a record is preserved relate to criminal law or police matters. It seems, indeed, as if *mandates* always had some indirect relation to the administration of a province, even when directly touching matter of private law. Thus, one mandate is cited as regulating the wills of soldiers; another as forbidding the marriage of a functionary (*qui officium aliquid gerit*) with the women in his province. L. 1, D. (xx. 19, 1).

§ 3.—*Codification.*

The notion of a systematically arranged body of law had naturally presented itself to the minds of reforming

lawyers and statesmen from the beginning of the period when the Roman dominion first comprehended numerous provinces beyond Italy, and when the claims of order and centralized administration in all departments became increasingly pressing. The XII. Tables and the systematized Prætor's Edict, though overlaid by written commentaries and expanded by oral opinions, nevertheless kept before the eyes of men a continuing protest in favour of an inclusive compendium of the whole law, arranged after as regular and symmetrical a method as the somewhat incompressible materials admitted of.

It has been remarked by Sir Henry Maine that the key to the arrangement of the XII. Tables, of the Prætor's Edict, and also of Justinian's Digest, is to be found in the early prominence of procedure, which, indeed, at the very first, covers the whole field of law. Thus, if other keys could be found, it might appear that the other portions of the early codes had similar justification for their places in the several systems to which they belonged. Nevertheless the numerous distinct sources of law at Rome,—due, as has been explained, partly to historical accident, partly to prevalent legal instincts, partly to constitutional vicissitudes,—made the total reconstruction of the whole law, on an orderly basis, a matter of growing political concern.

The first practical measure of systematic reform was undertaken by L. Cornelius Sulla, B.C. 82, though it related rather to public than to private law. Sir H. Maine in his "Ancient Law" explained how the conception of a classification of crimes really took its rise from the first permanent judicial commission (*quæstio perpetua*), established by L. Calpurnius, in B.C. 149, for investigating "claims by provincials to recover moneys improperly received by a governor-general." The next step was taken by Sulla, who gave to the same permanent commission jurisdiction over several forms of crime. Mommsen notices that from the Sullan legislation dates the distinction, substantially known to the earlier law, between civil and criminal causes. "The whole body of the Sullan ordinances as to the

Mommsen, Hist. iii., ch. x., Eng. ed. Chap. x.

quæstiones may be characterized at once as the first Roman code after the XII. Tables, and as the first criminal code issued at all."

It was natural that Cicero, who as a writer on the art of forensic oratory, as also himself experienced in the practice of courts of law and familiar enough with the heterogeneous nature of the legal system, should crave for a systematic code. In more than one passage in his works he complains almost pathetically of the condition of the law, and the wants of the day. Thus he says, "We have no recognized guardianship (*custodiam*) of the laws; and that is the law which the magistrates' clerks (*apparitores*) choose to call such: we betake ourself to professional copyists (*librarii*), we have no public records secured by public registers." In another place he propounds more specifically the cure for the uncertain and overburdened laws. He says, "For if I should be allowed myself (as I have long intended), or if, through my occupations or death, another instead of me should undertake, firstly, to distribute the whole civil law into logically divided classes, which are very few; secondly, to break up these classes into their several component branches; thirdly, by precise language to assign a strict and consistent meaning to every term; you would have the civil law presented in a form artistically exact, and, though still copious or even exuberant, no longer intricate and obscure."

Cic. De Legg. iii. 20.

De Orat. i. 42.

It will be seen from these two passages that Cicero completely apprehended the two distinct functions of a Code in the modern meaning of the term, namely, that of reducing to definite written language all the law, from whatever source derived, so as to exclude, as far as possible, all indecision as to whether a rule of law applicable to any given subject or situation exists or not; and also that of distributing the law as so written into classes and subclasses in such a way as may best conform to the requirements at once of abstract logic and of convenient reference for the different orders of persons, professional and others,

in the community who may have occasion to inform themselves as to the state of the law. It will be seen that one or other, and often both, of these functions of a Code always held their place in the minds of all systematical codifiers of Roman law up to, and including, the times of Justinian.

It seems that the task of systematically codifying the law was contemplated both by Pompey and Julius Cæsar in turn, but not proceeded with by either. The former was said to have "wished to reduce the laws to writing (*redigere in libris*), but did not persevere for fear of detractors," who might, it may be presumed, misrepresent his motives. Suetonius says of Julius Cæsar that "he had designed to reduce the civil law to definite proportions, and out of the enormous and scattered abundance of laws to collect what was best and alone essential and to digest it into as few written volumes as possible."

Isodore Orig. v. c. i, § 5, cited by Puchta i., § 107.

Suet. Jul. iv. 4.

Between the time of Julius Cæsar and that of Diocletian, that is, during the continuance of the undivided empire, no systematic effort seems to have been made either by private lawyers or by the government to deal with the law as a whole, though individual lawyers made, as has been already seen, numerous collections of imperial constitutions of particular kinds, and the work of statutory legislation through the medium of these constitutions generally was incessantly proceeding. Between the time of Diocletian and that of Justinian the work of codification of a more or less thorough and comprehensive kind made great advances, till it terminated in the sort of passion for legal systematizing which characterized the reign of Justinian. The successive efforts at partial or complete codification during this period may be reviewed under the following heads :—

1. The private collections of Gregorianus and Hermogenianus.
2. The Theodosian code and Theodosius' further projects for a more comprehensive code.
3. Certain collections of laws casually preserved in a fragmentary form, *e.g.* the "Vatican Fragments."
4. The "Barbarian" codes: the Breviary of Alaric;

"Papian," or the law of the Burgundians; the Edict of Theodoric.

5. Compilations of Justinian.

1. The Private Collections or Codes of Gregorianus and Hermogenianus.

Among the various collectors of imperial constitutions Gregorianus and Hermogenianus stand conspicuous. Their two works seem to have been more methodical and exhaustive than those of their contemporaries, and, perhaps, on the ground of these merits they were taken by the framers of the Theodosian code as the type to be imitated. Thus the imperial *oratio* to the Senate, which forms the introduction to the Theodosian code, contains among its first words the passage, "We decree that, following the example of the Gregorian and the Hermogenian codes, all the constitutions be collected together which Constantius, his successors, and we ourselves have enacted." L. 5, C. Th. (i. 1).

The number of constitutions which have been preserved as forming part of the Gregorian code is about seventy. It appears that the work was divided into books and titles. The period of time covered by the constitutions is from A.D. 196 to A.D. 296. The first constitution is one of the Emperor Septimius Severus, and the last that of Diocletian and Maximian. It is probable, therefore, that the collection was made at the close of Diocletian's reign or in the course of Constantine's. Nothing further is known of the author, Gregorianus, himself. Ortolan i. 459, Rivier Droit Roman, § 176.

The code of Hermogenianus is preserved through the medium of still more sparse and mutilated fragments. There are only thirty-two constitutions, without any sign of division into books, but only into titles with their rubrical heading. All the constitutions belong to the reigns of Diocletian and Maximian, and of Diocletian and Constantine, or the seventeen years between A.D. 287 and A.D. 304. There are, however, found in the ninth chapter of the "Consultatio veteris jurisconsulti" (a genuine juridical treatise

of the fifth century posterior to the Theodosian code), seven constitutions of Valentinian and Valens (A.D. 364–5) cited as coming *ex corpore Hermogeniani.* It has been suggested (by Cujas) that the true reading here is *ex corpore Theodosiano;* but no such constitutions are found in the Theodosian code, and therefore the real date and contents of the Hermogenian code are a matter of uncertainty. A jurist named Hermogenianus is frequently mentioned in the Digest. More than ninety extracts are cited from his work called "Juris Epitomæ" in six books. The author says he has followed the "order of the perpetual edict."

L. 2, D. (i. 5).
L. 5, D. (i. 1).

2. The Theodosian Code and Theodosius' further Projects for a more Comprehensive Code.

The Theodosian code, in the form in which it appeared, was nothing more than a continuation of the collections of imperial constitutions made by Gregorianus and Hermogenianus from the time of Constantine to that of Theodosius II. There is no doubt, however, that Theodosius contemplated the publication of a second code, resembling the Digest and Code of Justinian together, which should present not only a compendious account of the imperial constitutions actually in force, omitting all which had been repealed or superseded, but also a condensed and systematized series of extracts from the most authoritative writings and opinions of jurisconsults. This latter plan was never carried out, but the notice of it affords a key to Theodosius' plan in the preparation of his Code.

The task of preparing the code was undertaken in A.D. 429, three years subsequent to the enactment, by constitution, of the "law of citations," which reinforced the legal validity of Papinian, Paul, Gaius, Ulpian, and Modestinus, and invalidated the notes of Paul and Ulpian on Papinian. The chief agent employed by Theodosius in carrying the code through its various stages was his minister and prætorian prefect, Antiochus. Two successive commissions were appointed in A.D. 429 and

L. 3, C. (i. 4).

A.D. 435. The first commission consisted of eight members of the highest official distinction (*illustres*, or *spectabiles*), and a skilled jurisconsult described as *vir disertissimus et scholasticus* which may perhaps be rendered a man "especially skilled in words and books;" the second commission consisted of sixteen equally distinguished members, and Antiochus was president of both commissions.

It is curious to read in the opening of the code the alleged reasons for issuing it, as they throw some light on the condition of law and the legal profession, at all events in the Eastern Empire, in the early part of the fifth century. Theodosius complains of the small number of those who have any accomplished knowledge of the civil law. "After long night-watches of study expressed in their pallid faces, scarcely more than one or two here and there acquire a solid foundation of learning." The result is "unlimited and voluminous books and masses of imperial constitutions," which, by "interposing a cloud of black darkness and a rampart of obscurity, prevent the knowledge of them reaching mankind." De Theod. Cod. Auc.

The work was accomplished in nine years; and, after receiving the imperial assent, was published A.D. 438, by Theodosius in the east, and by Valentinian III. in the west. We have an account of the proceedings in the effete and servile Roman Senate on the reception of the code. M. Ortolan compares the account of the senatorial acclamations given at the head of the code to a modern newspaper report of the toasts at a public dinner. "Our hope is in you, our safety is in you," repeated twenty-six times; "dearer than our children, dearer than our parents," repeated sixteen times; "through you we have honours, property, all things," repeated twenty-eight times. M. Ortolan counts one hundred and one acclamations. More business-like proceedings were proposals "that numerous copies be made at the public expense; that they be deposited under seal among the public archives; that they be sent into the provinces; that a copy be placed in the office of every prefecture; that no one be allowed to annotate the code." Gesta in Senatu. Ortolan i. 100.

The code is divided into sixteen books, and each book into titles in which the subjects are arranged with some regard to method, the several constitutions belonging to each subject being placed in chronological order. The second commission was empowered to "cut off superfluities, to add what was needed to express the sense intended, to alter ambiguous language, and to reconcile incongruities." Thus the terms of the code are not necessarily the exact terms of the original constitutions embodied.

As to the contents of the code, the books seem to have been distributed as follows, so far as the present relics indicate.

Books I.–V. The general body of the civil law; that is, "private law."

„ VI. The law relating to the superior public officials.

„ VII. The law relating to military matters.

„ VIII. The law relating to inferior public officials.

„ IX. The law relating to criminal matters.

„ X. XI. The law relating to fiscal and revenue matters.

„ XII.–XIV. The law relating to towns and corporations.

„ XV. The law relating to public works and games.

„ XVI. The law relating to ecclesiastical matters.

It is among the first five books, which, if complete, would have thrown so much light on the condition of the mass of law, that the chief gaps are found. From the end of the sixth book to the close of the code the text is complete. Up to a few years ago only some incomplete extracts or abstracts of the matter in the first five books were known through their being contained in the "Barbarian" code of Alaric (*Breviarium*). But recently a great part of the missing constitutions was discovered by M. Amedée Peyron in the Turin library, and by M. Clopius in the library of St. Ambrose at Milan. These were first published at Tübingen in 1824.

The interest and importance of the Theodosian code is

very great. Not only was it the main vehicle for the diffusion of the knowledge of Roman law, as a compact and settled system, through the provinces of the Western Empire, but within little more than half a century it was adopted by the Gothic conquerors as the law applicable to their Roman subjects, and shortly afterwards became the type of a great part of Justinian's legislation. While opposing the assertion that the code constituted, for the fifth century, the whole Roman law, M. Guizot, in his lectures on "Civilization in France," says it would be quite accurate to say that, from a practical point of view, the Theodosian code was the most important law book of the empire; it was, moreover, the literary monument which diffuses the greatest light over this period. Lecture ii.

After publishing the code, Theodosius issued a series of Novells, many of which have been preserved, both independently and in other compilations, especially in the "Breviary" of Alaric, shortly to be described. These Novells were addressed to Valentinian III., the emperor of the west, and published by him for the use of his subjects in A.D. 448. This was in accordance with a constitution contained in the Theodosian code, sometimes called the law of unanimity, for settling the legislative relations of the two parts of the empire. This constitution enacted that any constitution issued in one part of the empire should be formally communicated to the proper office (*scrinium*) at the seat of government in the other part, and be there solemnly promulgated, after (and not before) which promulgation it should have the force of law in that part. L. 5, § 5, C. Th. (i. 1).

3. Certain Collections of Laws Casually preserved in a Fragmentary Form.

There are three legal compositions which belong to the fifth century,—and (as to two of them) probably to that part anterior to Theodosius' codification,—which are important not only for the number of legal rules of which they preserve the memory, but for their systematic method of

grouping together laws derived from different sources, which prepared the way for Justinian's Digest in the next century.

These compositions are known as—

(1) The "Vatican Fragments" discovered by M. A. Mai, librarian of the Vatican, and first published at Rome in 1823. The parts preserved are neither the beginning nor end of the work, nor are they continuous. The treatise seems to have been a compendious summary of rules of law as extracted from the writings of a number of leading jurisconsults whose names are given ; from separate imperial constitutions, of which the earliest is one of Marcus Aurelius, A.D. 163, and the latest is one of Valentinian I., A.D. 372 ; and from the Gregorian and Hermogenian codes. The collection is distributed into titles with headings, and in the modern editions each title is divided into numbered paragraphs.

Ortolan i. 517.

(2) "A comparison of Roman and Mosaic law" was first published at Paris in 1573. It is divided into titles with headings. After a brief description of the Mosaic rule of law on a subject, there follows a list of extracts from the writings of Roman jurisconsults, from imperial constitutions, and from the Gregorian and Hermogenian codes. Whether the Theodosian code is cited or not (which would fix the date of the treatise) depends upon whether in introducing an extract from a constitution of Theodosius I., A.D. 390, the words "*Item* Theodosianus" refer to the Theodosian code, or the reading should be "*Item* Theodosius." Considering that this is the only allusion of the sort, the latter hypothesis seems the more probable. There is some reason to suppose that Rufinus is the name of the writer, though nothing certain is known of him. He may by possibility have been a Rufinus, prætorian prefect to Theodosius I., or a Rufinus, a fellow-pupil of St. Jerome. The former died in A.D. 395, the latter in A.D. 410.

(3) The third of this class of documents is called "A

Consultation with an ancient Jurisconsult." This was first published by Cujas, in 1577, from a manuscript then recently found but which has since been lost. The work is a specimen of the practice in giving legal opinions. A series of questions are propounded in successive chapters, and in answering each question a series of citations from recognized texts is given, the authority in each case being accurately described. The authorities are few in number, as they do not extend beyond Paul's "Sentences" and the Gregorian, Hermogenian, and Theodosian codes. This partially fixes the date of the treatise.

4. The "Barbarian" Codes: the Breviary of Alaric; "Papian," or the Law of the Burgundians; the Edict of Theodoric.

During the fifth century the settlement of the three branches of the Gothic tribes, the Visigoths, the Burgundians, and the Ostrogoths, on the Roman territory in Gaul and Italy led to the construction of three celebrated codes for the government of the Roman part of the subjugated population. These codes have had much to do with the diffusion and preservation of the Roman law as settled by the Theodosian code, on the type of which each of the Gothic codes was framed and large portions of which it incorporated.

(1) The code of the Visigoths is sometimes called the "Breviary" of Alaric. It was published in Gascony in the twenty-second year of Alaric II., that is, in A.D. 506. Every copy of it which was sent to the district official for promulgation was accompanied by a public notice or introduction called *commonitorium*. The one which has come down to these times is styled *Alarici regis exemplar auctoritatis*. It is addressed to Timothy, a *comes*, and dignified as *spectabilis*. It is countersigned and certified by Anianus, whose name the "Breviary" often bears, also belonging to the class *spectabilis*, and presumedly a royal secretary or chancellor. The object of the codification is announced to be "the correction of what appears unjust

in the laws; the clearing up of the obscurities which present themselves either in the written Roman laws or in the unwritten legal principles of old time (*omnis legum Romanarum et antiqui juris obscuritas*); the removal of all ambiguities; and the comprehension within the contents of a single volume of selected extracts from the older jurists.

The code, when finished, was submitted to the judgment not only of the king but of the chief ecclesiastics and nobles, and, in each province, to that of the bishops and specially appointed persons among the provincials. The original code was deposited among the State archives under the care of the Comes Gojaric, and no copy could be officially used but one bearing the signature of Anianus. Citations were no longer allowed in judicial proceedings from laws or juridical treatises not incorporated in the code.

As to its contents the "Breviary" consists of two portions, the one embodying the *leges* or written law of Rome, the other embodying the *jus civile* or the unwritten laws, though the distinction is not very logically maintained. The former includes the Theodosian code and the Novells of Theodosius and his successors up to Severus, A.D. 461. The latter portion includes an abridgment of the "Institutes" of Gaius, of the "Sentences" of Paul, and of the Gregorian and the Hermogenian codes, and a single fragment in two lines of the first book of the "Responses of Papinian."

(2) The "Papian," or Roman law of the Burgundians, has some light thrown upon its history by the second preface to the code for their German subjects written under King Sigismond, who died in A.D. 523. This preface says, "All those who are in power, counting from this day, must judge between the Burgundian and the Roman according to the tenor of our laws, composed and amended by common accord. . . . We order that Romans be judged according to Roman laws, as was done by our ancestors; and let these latter know that they shall receive in writing the form and tenor of the laws according to which they shall be judged; to

Guizot Civil. in France, lect. x.

the end that no person can excuse himself upon the score of ignorance."

The code for the Roman subjects of the Burgundians was written subsequently to the year A.D. 517. It was divided into forty-seven titles; and Savigny has shown, by comparison of the rubrical headings, that the order of topics is the same as in the "Lex Gondobada," written for the German subjects of the kingdom. The code did not survive the absorption of the kingdom of the Burgundians by the Franks in A.D. 534. It gave way either to the vastly superior Breviary of Alaric or to the Theodosian code itself, which had been published at the first in the whole of the Roman territory subsequently occupied by the Franks. The title "Papian" for the Burgundian code was due to the accident that the two lines from Papinian, which closed the manuscript of the Breviary, in Cujas' copy of the Breviary, preceded immediately a manuscript of the Burgundian code, and was at first thought to supply a title to the latter.

(3) The "Edict of Theodoric" was a code of law issued, according to the more recent opinions, in the year A.D. 506, for the use of the Roman subjects of Theodoric, king of the Ostrogoths. The kingdom of the Ostrogoths in Italy was, in fact, founded by a sort of delegation from Zeno, the emperor of the East, for the purpose of conquering and expelling Odoacer. Theodoric had been brought up at the court of Constantinople, and his kingdom of Italy, succeeding to the place of that of Odoacer, was founded under quasi-Roman auspices, supplied by the court of the Eastern empire. His counsellors and administrators were Latins, such as Boethius, Symmachus, and Cassiodorus. His coins were stamped with his own image on one side, and that of the emperor of the East on the other. His kingdom was established in A.D. 493, that is fifty-five years later than the promulgation of the Theodosian Code. Thus, all the elements and motives were supplied for the publication of a new code for the kingdom of the Ostrogoths in Italy. The kingdom and the code

were destined to be alike supplanted in A.D. 553 by a legislator still more celebrated than either Theodosius or Theodoric, and destined to be better remembered for his codes than for his victories.

The code or "edict" of Theodoric purports in its prologue and epilogue to be written for the use both of his "Barbarian" and Roman subjects (*quæ Barbari Romanique sequi debeant*). The code is composed of extracts from the Gregorian and Theodosian Code, from the Novells of Theodosius II. and Valentinian III., and from Paul's "Sentences," and, besides a prologue and epilogue, contains one hundred and fifty-four articles.

The broad principles of justice which dictated the preparation of Theodoric's code are commemorated in some notices in the writings of Cassiodorus, the king's Latin secretary and minister. Such notices are: "Whatever associates itself with Italy becomes the subject of Roman law." "We take pleasure in conforming to the law of the Romans, whom we seek by our arms to claim as our own. Amidst a diversity of judges, let one and the same justice comprehend all."

Cass. Var. i. 27, vii. 3. Rivier § 180, Ortolan i. 529-532.

5. The Compilations of Justinian.

The compilations of Justinian, though consisting of treatises very different from each other in purport and character, can best be understood by being looked at as an organic whole, each part having definite relations to each of the other parts and to the whole. It must also be carefully borne in mind what were the political circumstances of the Roman world at the time Justinian addressed himself to the task of codification, and what were the legal materials at his command for the purpose of carrying out that task.

Justinian's work as a legislator and codifier was fourfold.

Firstly, he digested and converted into writing all that part of the law which may be broadly described as "unwritten," though this term must include much law which was originally written, such as enactments of legisla-

tive assemblies (*leges*, *plebiscita*, and *senatus consulta*) and the perpetual edict, but was now in force rather through custom, sufferance, and the fact of not being repealed, than because the authorities which enacted it had any longer a constitutional existence. This work, when accomplished, constituted the Digest, called in Greek the Pandects.

Secondly, he rearranged, republished, and in some way amended, all the law of his day, which may be strictly described as *written*, because it not only was written down from the first, but the enacting authority, that is the emperor, still retained his full constitutional position as supreme legislator, and the "constitutions" of himself and his predecessors had to be applied and interpreted with all the minute attention to the use, distinction, and precise meaning of the terms employed which only belongs to the reading of written documents. In this part of his work, Justinian had mainly to carry on to his own day the task inaugurated by Theodosius II., in imitation of the systematized collections of imperial constitutions prepared by Gregorianus and Hermogenianus. The work so accomplished constitutes Justinian's Code.

Thirdly, in close imitation of the work of Gaius,—written more than three hundred years previously, and embodying reference to many obsolete institutions and usages as well as overlaid with historical matter only interesting to the purely Roman student,—he had prepared a small treatise for use in the schools of law. This became the Institutes.

Fourthly, inasmuch as he continued issuing constitutions, often by way of radical amendment of important branches of the law, up to the end of his life, he seems to have, in his mind at least, provided a place for this desultory legislation by designing the publication of a sort of systematic supplement to his code or, perhaps, a series of fresh and amended editions of it. But this purpose was not carried out. The new constitutions were merely transcribed into a single book, and deposited among the archives of the Empire (*in sacro laterculo deponi: sacrarum nostrarum constitutionum volumen*).

Nov. 17, De Mand. Prin. Nov. 24, Nov. 25.

The following is a summary view of the dates and chief

epochs of Justinian's achievements in the direction of codification.

Justinian became sole emperor in A.D. 527. In the following year he issued his first commission for the preparation of a code.

Commission for first Code,	Feb. 13th, A.D. 528.
Publication of first Code,	April 7th, A.D. 529.
Commission for the Digest,	Dec. 15th, A.D. 530.
Publication of the Digest,	Dec. 16th, A.D. 533.
Publication of the Institutes,	Dec. 21st, A.D. 533.
Repeal of Code of A.D. 529 and publication of second code (*repetitæ prælectionis*),	Nov. 16th, A.D. 534.

Between the time of the publication of the first and of the second code, Justinian published, at Tribonian's suggestion, in a systematic shape, Fifty Decisions on controverted points of law. The Fifty Decisions and some other occasional constitutions were no doubt incorporated in the second code, and influenced the settlement of controverted points adverted to in the Digest and the Institutes.

The general principles of collection, correction, arrangement, and modification, to be applied to the code by the commissioners, were much the same as those already cited as applied in the preparation of the Theodosian code. The second code, which alone has come down, is divided, like the first, into twelve books. It seems that some constitutions contained in the first code were suppressed in the second, because references to them in the Institutes, published in the interval, cannot be verified. The constitutions (4652 in all) are placed under different titles, amounting to 765 in all, the emperors who issued them being in all cases named. The oldest constitution cited is one of Hadrian's. The order of the books and titles follows that of the Digest rather than that of the Theodosian code. The constitutions relating to the Church appear at the beginning instead of, as in the Theodosian code, at the end.

In the instructions given through Tribonian to the

commission for the preparation of the Digest, and which now appear in the preface to it, are contained some passages which do much to explain the purpose and method of the work. Thus the commissioners are directed not to guide themselves by the mere numbers of the authorities; not to reject the notes and commentaries of any, but to avail themselves of the best material they could find. They had very full powers for supplementing, correcting, and even repealing, old law, and especially for reconciling and avoiding contradictions (*antinomia*). Probably the haste with which the Digest was completed prevented the commissioners taking full advantage of these very extensive powers. § 6, 7.

The Digest, as issued, included extracts from as many as 2000 treatises by forty writers, and is said to have reduced 3,000,000 of lines to 160,000. It is divided into fifty books, distributed into 432 titles, and containing 9123 extracts, each with the name of its author and of the work cited. Each fragment is, in accordance with Justinian's express order, a distinct law; and, in the Middle Ages, these laws were distributed into paragraphs and numbered, the opening paragraph being not numbered but called *principium*. Thus a passage referred to is indicated by its paragraph, law, title, and book.

Many modes of arranging the figures have been adopted in different times and countries. The one adopted throughout this book is the modern continental one of enclosing the book and title in a parenthesis to the right of the initial letter of the word Digest, and placing the number of the law and its paragraph to the left. Thus L. 1, § 1, D. (xliii. 1) means the first paragraph of the first law of the first title of the forty-third book of the Digest.

The fifty books of the Digest were divided by Justinian's constitution entitled "*Tanta*" as follows, the importance of the division being mainly historical. § 2, 7.

I. Books I.–IV. πρῶτα.
II. „ V.–XI. *De Judiciis.*

III. Books XII.–XIX. *De Rebus* (*creditis*).
IV. „ XX.–XXVII. *Umbilicus* (το μέσον τοῦ πάντος).
V. „ XXVIII.–XXXVI. *De Testamentis.*
VI. „ XXXVII.–XLIV.
VII. „ XLV.–L.

The general subjects of each of these seven parts were—

I. Public officials, jurisdiction, the summary proceedings of the prætor, and the legal position of special classes of persons.
II. Judicial proceedings and rights of action.
III. Contracts.
IV. Rights of mortgagees, marriage, guardianship.
V. Wills, legacies, testamentary trusts.
VI. Rights and remedies in respect of property, obligations, and actions.
VII. Obligations, civil injuries, crimes, rights of the public treasury and municipalities, definition of terms, legal maxims.

The glossators, commencing with Irnerius of Bologna, A.D. 1100, annotated the Digest, dividing it into three parts—

I. The *Digestum Vetus*, from book i. to book xxiv. inclusive.
II. The *Infortiatum*, from the third title of book xxiv. to book xxxviii.
III. The *Digestum Novum*, from the first title of book xxxix. to the end.

The last part of the *Infortiatum* was made a subdivision and called by the name "*tres partes*," from the words *tres partes ferant legatarii* at the beginning of the division.

L. 32, D. (xxxv. 2).

Justinian's Institutes need little comment. The order of Gaius' Institutes is closely followed, and the language also is copied wherever a law is the same that it was in Gaius' time. The main difference is in the omission of the historical and antiquarian matter which forms so con-

spicuous a feature in Gaius' work, especially in the last part, in reference to procedure. The more purely Roman society, for which Gaius wrote, might be expected to have an interest in much which, for the Græcised world of Constantinople, would seem irrelevant and superfluous. Besides, Gaius' treatise seems to have been more distinctly intended for educational use. Justinian's Institutes, though having its place in his educational scheme, as will shortly be seen, appears to have been at least as much intended for a practical handy-book of the whole law for the use of the subjects of the empire generally.

The Novells were, as was seen, imperial constitutions promulgated by Justinian subsequently to the publication of his second code. They do not seem to have been issued in a collected form in Justinian's lifetime, which has caused some special difficulties in obtaining a correct version of the text. Two texts, one in Latin and the other in Greek, in fact compete with one another.

The Latin text, called the *Authenticæ* or the *Authenticum*, was very early distributed throughout Italy, but its origin is uncertain. The text has not come down without mutilation and some gaps in all the manuscripts. There were one hundred and thirty-four Novells in the original collection, and from these the glossators detached thirty-seven as no longer applicable in their day, and to which they gave the name *extravagantes* or *extraordinariæ*.

The origin of the Greek collection is likewise unknown. It purports to contain in all one hundred and fifty-nine constitutions of Justinian ; but four of these are in duplicate, and there are three which belong to another separate collection of Justinian's constitutions, styled, not Novells, but "Edicts." These deductions make the number of Novells in the Greek collection up to one hundred and fifty-two.

Besides these collections, in A.D. 564, John, Patriarch of Constantinople, published, in connection with a historical account of the ecclesiastical canons, illustrated extracts from Justinian's Novells ; and Julian, professor of law at

Constantinople, published, in A.D. 570, an abridged edition of the Novells in Latin. Both these treatises have come down to these times and are of obvious value in interpreting and ascertaining the text of the Novells.

The Latin collection (*Authenticum*) is that which will here be referred to. The two-fold mode of arrangement, by constitutions numbered throughout, and by arbitrary divisions (*collationes*) (nine) and titles, is inevitably perplexing.

The prominence of an educational object in all Justinian's schemes for codification renders it necessary to give some account of the state of legal education in the capital towns of the empire in Justinian's day. This is the more necessary and interesting, as Justinian himself, in a lengthy constitution which prefaces the Digest, and is sometimes entitled, from its first words, "Summam Rem Publicam," communicated to the eight leading professors of law in the school of Constantinople his intentions and wishes.

In the year A.D. 425, Theodosius had established a University at Constantinople in imitation of one already existing at Rome. The constitution establishing this University was transferred, without alteration, to Justinian's code. By this enactment definite rules for instruction of various kinds were laid down. Professorships were instituted in the Latin and Greek languages and literature, one in philosophy, and one in law. The professors were required to give public lectures, and were forbidden to give private teaching of any kind. No other persons were allowed, under the heaviest penalties, to give any public lectures, though they might teach privately.

C. Th. (xiv. 9). C. J. (xi. 18).

At the time of the publication of Justinian's compilations Rome was still in the hands of the Ostrogoths. It nevertheless continued, partly out of courtesy and partly out of policy, to be treated in documents emanating from Constantinople as if it were still free, and was named the royal city ("Urbs Regia"). In spite, however, of the occupation by Theodoric, it appears that the Roman university still survived. Cassiodorus, minister of Theodoric, who

largely helped to sustain the memory of Roman usages, mentions an ordinance of Theodoric's successor, Alaric, who died in A.D. 534, relative to the university, in which, among other professors, is mentioned the professor of law (*nec non et juris expositor*). Twenty years afterwards, in A.D. 554, when Justinian had reconquered Italy, he made special provision for the maintenance of all the professors (of literature, medicine, and law) on the same scale as had been fixed by Theodoric (*quam et Theodoricus dare solitus est*).

Cass. Var. ix. 21.

Epit. Jul. Nov. Tib. chap. xvii. Ortolan i. 574.

It may thus be presumed that the methods of teaching prescribed by Justinian were really put in practice, not only in the Eastern schools of Constantinople and Berytus, but also in that of Rome. The exact prescriptions may be briefly given as follows :

In the first year the students were to learn Justinian's Institutes, and in the latter part of the year the first four books of the Digest, that is, the πρῶτα.

In the second year they were to learn either the seven books of the Digest (from book v. to book xi.), styled in the arrangement already described as *de judiciis*, or else the eight books from book xii. to book xix., *de rebus*, according as the professor should find most convenient, but without intermixture. Besides these, four books on special subjects were to be chosen on the following principle of selection : one of the three treating of the *dos* (books xxiii., xxiv., and xxv.) ; one of the two treating of guardianship (books xxvi. and xxvii.) ; one of the two on wills (books xxviii. and xxix.) ; one of the seven on legacies and testamentary trusts (books xxx.-xxxvi).

In the third year the students were to take the books *de judiciis* or *de rebus*, according as one or the other was omitted in the previous year. Similarly certain special books were prescribed as before, and it was particularly enjoined that the students in this year should attend to discourses on the extracts from the works of Papinian as contained in the Digest. The students of this year were accordingly to retain the name on which they had been accustomed to pride themselves, of "Papinianists," and to

keep up the celebration of the festival customary on commencing the study of his works.

In the fourth year the students were to study the ten books omitted out of the fourteen special books mentioned for selection in the second year.

In the fifth year they were exhorted to study the code.

Henceforward legal instruction was to be confined to the royal cities of Rome and Constantinople and to Berytus. Persons professing to teach law at Alexandria or Cæsarea, as heretofore, or anywhere else, would be fined twenty pounds in gold and be expelled from the city "in which they are not teaching the laws but offending against the laws" (*in quâ non leges docent sed in leges committunt*).

The carrying out of this educational scheme was confided to the care of the prefect of the city of Constantinople; to the President of Maritime Phœnicia in Berytus, as well as the bishop and professors of law in that city. "Begin, then," adds Justinian, "under the Divine guidance to pass on to these the knowledge of the law, and open out the way which we have discovered, that they may become good servants of public justice and of the State itself, and you may be honoured in all ages to come."

It remains but to record the fact that on the re-establishment of the Roman Empire in Italy by Justinian, the several legal compilations above described were publicly promulgated as law for the whole re-united empire.

PART II.

THE SUBSTANCE OF ROMAN LAW IN THE TIME OF JUSTINIAN.

CHAPTER I.

OF THE GENERAL SUBJECT-MATTERS AND MATERIAL OF THE LAWS (PERSONS, THINGS, ACTS, RIGHTS, AND REMEDIES).

§ 1.—*Of Persons.*.

A *person*, for purposes of jurisprudence, is a human being looked upon as capable of being invested with legal rights, or as liable to perform legal duties. Thus, a human being who is in a condition of absolute slavery, or who is, by way of punishment, permanently deprived of all freedom of action and claim to legal redress, or who, as an alien or outlaw, is for the time without such freedom and such claim, would not be reckoned as a legal person. The amount, indeed, of a person's duties and claims may be,—as in the case of a slave, or (in some countries and periods) a woman, or a young child, or a lunatic, or a prisoner,—extremely minute, and the ascertainment of this amount belongs to the part of the law which deals with the special relationship and situation of persons in society (see chap. iv.). But at the outset of a legal system it is necessary to determine the marks of true legal personality, in the sense above given, and what are the signs of the beginning and ending of that personality.

It may be noted here that, for some purposes, human beings are treated as *things*, the objects of rights, and not as *persons;* as where a man can bring an action for the illegal detention of, or injury done to, his servant, apprentice, ward, wife, or child. So also, as will appear below, a *thing*, or assemblage of *things*, sometimes has impressed upon it the character of legal personality and is ranked, in common with certain recognized assemblages of human beings, as an "artificial" or "fictitious" person, in opposition to "natural" persons. This is really a device of legal logic, because, for example, it was (in Roman law) held more convenient to designate the imperial treasury (*fiscus*), and the innumerable things forming part of an inheritance, as a single person, and to impute to that person the rights and duties appropriate to personality, than to adopt some other hypothesis which might be still more far-fetched and circuitous and less manageable in practice.

The following were, in Justinian's time, the chief circumstances by reference to which the personality (either total or partial) of a human being was tested :—

(1) Birth.
(2) Continuance in life. Age.
(3) Health.
(4) Sex.
(5) Reputation.
(6) Religion.
(7) Domicile.

To understand the relevancy of all these circumstances it must be supposed that all the rights and duties which, taken together, constitute legal personality, form an integral whole or type which is always in the jurist's eye, though, owing to accidental or temporary facts, this type may not be completely exhibited in any particular case. Certain facts intervene by which complete personality is mutilated or suspended. The terms *status* and *caput* were used (not very precisely) to express the rights and duties, the presence of which determined personality. *Status* was the more general term, and even included the rights and duties of a slave—such as they were in imperial times—and

of a lunatic. *Caput* denoted certain of the rights and duties inherent in personality of the most ideal and complete kind, and which loss of citizenship (*minor vel medla capitis diminutio*) or, still more, loss of freedom (*maxima capitis diminutio*) would impair. Even the fact of passing out of a family by "emancipation," or into a family by "arrogation," occasioned such a disruption of the previous legal situation as to bring about a minute loss of *caput* (*minima capitis diminutio*). Thus neither of the terms *status* and *caput* meant any determinate set of rights and duties, but merely loosely described classes of important rights and duties, of which the latter were more valuable, and therefore less widely diffused than the former.

D. (i. 5). L. 20, D. i. 5), Austin's lect. xli., xlii.

J. (i. 16).

(1) Birth.

In order to have legal personality, a child must come into the world alive, even though it die instantly, or have no capacity of surviving long. The child must have a true human form, though this is consistent with its exhibiting in its structure freaks of nature, if they are not "contrary to nature." For many purposes, where the child's own interest is concerned, the date of birth reckons from the time of its conception.

L. 9, D. (xxxv. 2). L. 3, C. (vi. 29). L. 231, D. (l. 16). L. 38, D. (l. 16).

(2) Continuance in Life. Age.

There was a general presumption that human life was a hundred years long, and this seems to have been the basis of certain laws of prescription. But the fact of death had always to be positively proved. When a parent and child died by a common accident, the parent was presumed to have died after or before the child, according as the child was at the time, under or over the age of puberty (fourteen years of age). This sort of presumption was not extended to any similar case. In the event of one dying when in the enemy's hands

L. 56, D. (vii. 1). L. 23, pr. C. (i. 2). L. 9, § 4, D. (xxxiv. 5). L. 18, D. (xxxiv. 5).

as a prisoner of war, the date of death was taken to be that of the original capture. If the prisoner returned alive he was treated, so far as was possible, as having been throughout in possession of all his original rights (*postliminium*).

L. 5. J. (i. 12).

The acquisition of the full rights and duties of personality depended on the accomplishment of a certain amount of physical development, and the rights and duties were, in fact, portioned out according as successive stages in this development were attained. The most clearly marked and decisive of these stages are *infancy*, ending at seven years of age; * *puberty*, definitely fixed by Justinian at twelve years of age for girls and fourteen years of age for boys; and *majority*, fixed at twenty-five years of age. For some purposes other intermediate stages were noticed, as that of proximity to infancy, proximity to puberty, and some other more definite ages between puberty and majority, as those of seventeen, eighteen, and twenty. The periods of proximity to infancy and to puberty were not very precisely ascertained, and were, in fact, only noticed in the practical administration of justice where the interests of the person concerned in the special case seemed to render it expedient.

L. 18, C. (vi. 30).

L. 3, C. (v. 60).

L. 1, D. (iv. 4).

In some cases young men of the age of twenty, and young women of the age of eighteen, if their character was good and the occasion plausible, could be put in the same legal situation as to managing their property (but not as to alienating or mortgaging it) as those of full age. They were said to obtain "indulgence" for their age (*venia ætatis*). The recognition of these legal disabilities, incident to certain definite periods of life, must be distinguished from the general exercise of the prætor's function, by which, in case of ignorance, or fraud, or violence, he rescinded acts done and restored the parties to their original situation. The opportunity for the exercise of this function was naturally presented most

C. (ii. 45).

* See "Unterholzner" in *Zeitschrift für geschichtliche Rechtswissenschaft*, pp. 44–53.

frequently in the case of the young. Special legislation also protected the young, such as the *senatus consultum Macedonianum*, by which relief was given to those who, being expectant heirs, had bound themselves by various debts in their parents' lifetime. D. (iv. 6). A.D. 46. D. (iv. 6). C. (iv. 28).

For some purposes the period of old age was definitely assigned; thus, generally speaking, and in default of some special reason to the contrary, a man who was more than sixty years old could not adopt a person subject at the time to no one else's power; and a person who had completed his seventieth year could excuse himself from becoming a guardian and undertaking other public functions. L. 15, D. (i. 7). L. 3, D. (i. 6).

(3) HEALTH.

A certain average condition of physical and mental health was presupposed for the exercise of the legal rights and the discharge of the legal duties which personality implies. This condition might, however, in particular cases, be absent; and in a greater or less degree, and permanently or temporarily, absent. The illness might thus be either bodily or mental, so far as a distinction could be drawn between these two classes of complaints. If bodily, it might involve a congenital, or, at least, a permanent disability, such as malformation, blindness, or being deaf and dumb, or maimed for life; or it might be merely temporary, as a fever. If mental (*furor*), the disease might be permanent, or admit of lucid intervals. Two general consequences resulted from diseases of all sorts so long as they lasted, and to the extent that actual incapacity followed from them. One was the invalidity of the patients' legal acts, or rather of those acts which otherwise would have had a legal import. The other consequence was the appointment of a guardian to the patients' property. Some diseases, as fevers, were specially characterized as being of a kind to interrupt legal proceedings (*morbus sonticus*). Besides the condition of recognized mental incapacity, there L. 2, C. (iv. 38). L. 60, D. (xlii. 1).

were some approximate conditions which were sometimes taken notice of in the administration of law. Such were folly, simplicity, or rusticity.

(4) Sex.

It was still true in Justinian's time as in that of Papinian, that "in many particulars the legal position of women was inferior to that of men." It would be difficult to say how far this legal inferiority was due to a *bonâ fide* belief in the comparative infirmity of the feminine intellect, or was a necessary consequence of the constitution of Roman society, under which the head of the household and the root of succession was a man, and not a woman, or was an expression of an undefined repugnance to women appearing in public and taking part in other than domestic concerns. Probably these causes co-operated and sustained one another. Women had been long included by the prætor among the classes to whom ignorance of law was excusable; and the terms of this protection had been defined and restricted by imperial legislation.[1] Except by special favour of the emperor, and in the place of lost children, women could not adopt.[2] They could not exercise the calling of a banker which was a quasi-public office;[3] and they were explicitly declared to be set apart (*remotæ*) from all civil or public functions, especially of a judicial, magisterial, or religious kind.[4] By the *senatus consultum Velleianum*, they were prevented from becoming securities for other persons.[5] But there are signs that, in some parts of the law at least, differences on the ground of sex were, in Justinian's time, becoming effaced.

L. 9, D. (i. 5).

[1] L. 18, C. (i. 18). L. 38, § 2, D. (xlviii. 5).

[2] L. 10, J. (i. 11).

[3] L. 12, D. (ii. 13).

[4] L. 2, D. (l. 17).

[5] A.D. 46. D. (xvi. 1).

The life-long tutelage of women had entirely vanished by Justinian's time, and all mention of it disappears from his Institutes. Even in Gaius's time it would seem that it was becoming obsolete, and was recognized as little better than a worthless obstruction. By

Gaius (i. 111).

Justinian's time the marriage *in manum*, by which a woman passed into the legal "family" of her husband and acquired the property-rights of a daughter, was probably disused in the chief cities of the empire, though it is likely enough that it lingered on as a custom in the remoter parts of the provinces. The restrictions on divorce, introduced by successive Christian emperors, must have had the effect of equalizing men and women in the marriage state. But the deeply-seated institution of the paternal power, and the strict idea of the legal family which sprang from it, could not but place women in many respects at a marked practical disadvantage as compared with men. The *senatus consulta*, *Orphitianum* and *Tertullianum*, by which, respectively, sons, in certain cases, were enabled (to the exclusion of others) to inherit the property of their mothers, and mothers, in certain cases, to inherit the property of their sons, were legislative efforts to combat the moral injustice resulting from the still persisting preference of males to females in the law of descent. Justinian's final and comprehensive reform of the whole law, which governed intestate successions (Novell cxviii.), completed these remedial efforts so far as members of the Christian Church were concerned.

J. (iii. 3, 4).

The general rule of interpretation was that where the masculine noun or pronoun was used the feminine was included, but not *vice versâ*.

L. 1, D. (l. 16).
L. 195, D. id.
L. 45, D. (xxi. 1).

(5) Reputation.

A general assumption was made that every person was possessed of a certain average reputation (*existimatio*) among his fellows; and the possession of this reputation was not only a substantive right in itself, for the violation of which a remedy by action was provided, but was the foundation or condition of other valuable rights. Thus the loss of reputation might either be brought about by operation of law in the way of penalty or censure, or be a patent fact, independent of all other facts, of which the administrator of the law was, for some

L. 1, J. (iv. 4).

purposes, bound to take judicial cognizance. In the one case the law or the judge affixed the stigma. In the other case the judge found it already present as a fact, and attached to it certain consequences.

Reputation might be entirely or only partially lost. It was entirely lost (*consumptus*) only by loss of liberty, by transportation, or by sentence to the mines; it was partly lost (*minutus*) by the action of law or the action of society (*infamia juris vel facti*). The law might act directly without any judicial sentence, or indirectly with the aid of one. The grounds of strictly legal infamy were numerous, and a long list of them was contained in the Prætor's Edict, verbal extracts from which are given in the second title of the third book of the Digest. Among these grounds are dismissal from the army for ignominious reasons; publicly appearing as an actor, or being a public pandar; being sentenced in a criminal trial for collusion or false accusation; being the loser in an action for fraud, violence, malicious injuries, or malice; or being the loser in an action in a matter of partnership, guardianship, agency, or deposit; and committing divers offences in respect of marriage towards women in one's own power or in the power of others. Other grounds were fighting with beasts in a public arena for reward or show; adultery and prostitution; breach of an agreement for settling disputes; suffering removal from the office of guardian on the ground of doubtful character (*suspecti remotio*); marriage or son's marriage with a ward; breach of promise of marriage. It will generally appear at once, from the nature of the case, which of these cases involved a judicial sentence in order to affix the stigma of infamy, and which of them operated by the inherent force of the facts.

L. 1, D. (iii. 2).

See Arntd's Lehr-buch, § 31.

The deprivations of rights, which infamy of the above sort involved, were (1) exclusion from all offices of honour;[1] exclusion from the army;[2] disability to institute a public indictment;[3] disability to represent another in a court of justice, except in certain cases of special rela-

[1] L. 2, C. (xii. 1).
[2] L. 4, § 6, 7, D. (xlix. 10).
[3] L. 15, C. (ix. 1).

tionship ;[4] disability to be admitted as a witness, or, at least, without affording special grounds of suspicion; disability to inherit under a will, if brothers and sisters, who have been passed over by the testator, choose to apply to have the will set aside as regardless of natural claims (*inofficiosum*).

[4] L. 1, § 11, D. (iii. 1).

L. 27, C. (iii. 28).

Besides the more determinate marks of legal infamy, the fact of bad repute was, for some judicial and legal purposes, taken notice of, and various shades of disrepute were adverted to in statutes. Such were "turpitude" and a "slight stain" (*levis notæ macula*) on the reputation, which were distinguished from technical infamy in being cognizable rather by "fact and public opinion" than by formal description. The effects of this disrepute were that a will could be set aside by brothers or sisters if a disreputable person were instituted heir ;[1] and that notice could be taken of the fact of bad repute in appointing to offices of honour,[2] in determining questions relating to the custody of one under age,[3] and in estimating the credibility or admissibility of a witness.[4]

[1] L. 27, C. (iii. 28).

[2] L. 2, C. (xii. 1).

[3] L. 3, § 4, 5, D. (xliii. 30).

[4] Nov. (xc. 1).

The emperor, the senate, and the prætor (within the limits of his jurisdiction) could remit the penalty of infamy,[1] which otherwise adhered till death,[2] and even in spite of all other penalties being remitted.[3] If by mischance a person underwent a punishment, other than pecuniary, heavier than the law awarded, the penalty of infamy ceased to attach to the offence.[4]

[1] L. 1, § 9, 10, D. (iii. 1).

[2] L. 6, C. (ii. 12).

[3] L. 3, C. (ix. 43).

[4] L. 13, § 7, D. (iii. 2).

(6) RELIGION.

Between the time of Constantine and Justinian orthodoxy of religious belief became increasingly a test of complete personality. By the time of Justinian, the subjects of the empire were broadly distributed into Christians and those who were not Christians. Christians were distributed into Catholics and heretics, the latter term denoting Christians whose doctrine had been condemned

by a general council. Those who were not Christians were distributed into pagans, apostates, and Jews. It was only orthodox, that is, Catholic, Christians who were in full possession of all civil rights, or, at least, were not subject to any disability on religious grounds. It would seem, however, that a favourable presumption was made in the case of every one that he was an orthodox Christian, and it was only in the case of persons belonging to notoriously heretical sects, or being manifest renegades, or engaging in illicit rites, that disabilities attached. A full account of these disabilities belongs rather to ecclesiastical and general history than to the field of pure law. They were the vagaries of a special age, and belong to the curiosities of antiquity. They are only remotely connected with religious disabilities of modern times, and are of juridical moment only from the illustration they afford of the modes in which the ordinary action of legal and judicial machinery may be made subservient to the ends of religious persecution.

1. All *pagans* were under a general liability to be baptized; and if not baptized, they were said to have "no part in the State," nor to be capable of owning things movable or immovable, which consequently lapsed to the public treasury.[1] If they indulged in forbidden rules or sacrifices, or taught their doctrines, they were liable to further punishments.[2] Property left or given for pagan uses (to persons or places) were confiscated for the benefit of the neighbouring city.

[1] L. 10, C. (i. 11).

[2] L. 10, C. (i. 11).

2. *Jews* and pagans, as well as heretics, were forbidden to hold Christians as slaves. Jews were generally protected in the exercise of their religious rites and in the observance of the sabbath; and Christians were specially forbidden to molest or rob Jews and pagans who behaved themselves peaceably. Jews were also entitled to avail themselves of the ordinary courts of justice, even though matters of their own religion were incidentally involved; or if they chose to refer a matter in dispute to a Jewish tribunal, the courts would

L. 2, C. (i. 10).

L. 6, C. (i. 11).

give effect to the award.[1] Intermarriages between Jews and Christians were not only forbidden but were punishable as adulterous.[2] All attempts at proselytism to Judaism were rigorously prohibited.[3] The testimony of Jews and of heretics was equally excluded as against an orthodox Christian, though it was decided by the forty-fifth Novell that this disability did not prevent either Jews or heretics serving on the local town councils, from which service exemptions were much coveted. Jews, however, were disqualified to hold any office of dignity or honour, especially of a magisterial nature.

[1] L. 8, C. (i. 9).
[2] L. 6, C. (i. 9).
[3] L. 17, C. (i. 9).
L. 21, C. (i. 5).
L. 18, C. (i. 9).

3. It is needless to notice that *apostacy* from the Church, especially to Judaism, was a signal offence. It involved not only forfeiture of all property but disability to witness, to make, or to take, under a will.

C. (i. 7).

4. *Heretics*, however, seem to have been in the most unfavourable position of all, and especially *Manichæans*. In fact, legal language can hardly bear the strain put upon it to describe the disabilities and penalties which attached to heresy. By way of illustration, with respect to the Manichæans and Donatists, it is broadly laid down that "this sort of men have neither by law nor custom anything in common with others." Their offence was a public one, because "an offence to religion is injurious to every one." It was accompanied by forfeiture. The offenders could take property neither by gift nor succession. On conviction they can neither give, buy, sell, nor make a contract. They can make no will, and their children can only enter on their inheritance if they abandon their father's heresy.

The treatment of the Samaritœ heretics is instructive, as it intimates some spirit of moderation and seems to have vacillated even in Justinian's time. By the 129th Novell, the severe laws against the Samaritœ are expressly relaxed, and they are allowed to make a will, or, in case of intestacy, to have legal heirs like others, and also to make a gift and to receive one, and to make contracts generally. But on an intestacy, orthodox

Nov. (cxxix.).

children and cognates were preferred to children and cognates of the father's persuasion. But in one of the latest Novells (the 144th) Justinian announces that the Samaritan heretics cannot take under a will or a gift, and that neither the Samaritans, nor heretics generally, nor those who insincerely pretend to embrace the true Christian faith, can succeed on an intestacy, nor make a will, nor an effectual grant, unless the recipients under the will or grant be orthodox in their belief, and that in default of such recipients the property be confiscated to the State. Special legislation (Novell 132nd) was also directed against public collections for heretical purposes, and not only were the collectors liable to punishment, but the places in which the collection took place was confiscated to the Church.

Nov. (cxliv.).

Nov. (cxxxii.).

It has already been noticed that the new law of intestate succession, introduced by Justinian (Novell 118th), by which natural relationships were substituted for the antiquated relationships of the civil law, was confined in its operation to the members of the Christian Church.

(7) Domicile.

A person's rights and duties were, in some respects, dependent on his habitual residence as distinguished from the fact of his citizenship. For purposes of local government, and especially for the purpose of the administration of justice, the whole empire was distributed into small subdivisions, which varied greatly in their names, their extent, and their organization. The most general term for one of these subdivisions was township (*civitas*); and the permanent members of the township were called citizens (*cives*), or *municipes*, as liable to bear municipal burdens. A person became a permanent member of a township by birth (that is, through his father), manumission, adoption, and public nomination as a town councillor (*allectio*). He was, through life, bound to submit to the magistrates of his township, to obey its courts of law, and to discharge such public functions as it might cast upon him.

L. 7, C. (x. 39).

L. 27, D. (l. 1).

But permanent residence (*domicilium*) in a township or (for some purposes) in a province also cast upon a person peculiar liabilities in respect of the township or province. Such a residence or domicile is founded when one "manages one's business in a place; buys, sells, contracts there; uses its forum and its baths; celebrates festivals there; enjoys all its advantages" and none of those elsewhere; or, according to another definition, "one undoubtedly has a domicile in that place where one has settled one's house and one's fortunes; whence one has no thought of departing unless called away; to leave which is to be from home; to return to which is to cease to be from home." L. 27, D. (l. 2). L. 7, C. (x. 39).

It was disputed whether a person could have more domiciles than one. Labeo said, No. Paulus and Ulpian held that a person could have two domiciles if he did not settle himself and his business more at one place than at another. L. 5, 6, D. (l. 51).

Domicile was either a matter of voluntary choice, or arose out of an absolute presumption of law. Whether it was a case of voluntarily assuming a domicile or of changing it, there was to be an actual residence, coupled with an intention of remaining for an indefinite time.[1] Thus a traveller or a student, even though they remained for a long time together at a place, did not establish a domicile there.[2]

[1] L. 20, D. (l. 1).
[2] L. 2, C. (x. 39).

An absolute legal presumption as to domicile was made in favour of the husband's domicile for a wife or widow; of the father's or mother's domicile for legitimate or illegitimate children respectively, till they chose for themselves; of the place where they served, for soldiers; of the place of banishment, for the banished; and of their former master, for freedmen. See D. (l. 3).

The consequences of domicile were (1) the liability on the part of a defendant to be sued in the place of the plaintiff's domicile; (2) the liability on every one to obey the executive officers of the township in which he was domiciled; (3) the liability to perform all public functions appertaining to the L. 2, C. (iii. 13). L. 3, C. (iii. 19).

township in which he was domiciled;[1] (4) the liability of a person bound to pay a sum of money in Italy to be sued either in the province of his domicile or in Italy;[2] (5) the application of twenty years' instead of ten years' prescription for immovables, if the parties had their domicile in different provinces.[3]

[1] L. 29, D. (l. i).
[2] L. 19, § 4, D. (v. 1).
[3] L. 1, 2, C. (vii. 33).

Persons absent from their usual place of residence were likened to those who were out of their mind (*furiosi*), and their interests were in various ways protected.

L. 124, D. (l. 17).

Fictitious or Artificial Persons.—Description and Classification of Corporations.

As society progresses, it is recognized that it is not sufficient only to accord rights to, and impose duties upon, determinate and individual human beings. The necessity of co-operation and combination for purposes of industry, trade, the public service, and social intercourse, as well as the importance of preserving a continuity of right and duty which shall be independent of the accidents of human life, lead to the enlarged conception of legal persons, which expresses itself in such artificial unities as guilds, colleges, universities, corporations, and the like. Such a conception had thoroughly penetrated the fabric of Roman law and society long before the time of Justinian, and the appropriate legal consequences had worked themselves out with considerable exactness.

The conception, indeed, was extended for purposes of legal convenience even beyond the original sense of an assemblage of persons, determinate or indeterminate, treated as an integral unity. The same hypothesis of a legal personality was made in certain cases where no human beings were directly concerned at all, but where it was desired to assume, provisionally, a fixed centre, to which a group of rights and duties might, for some purposes, be referred. Thus in the case of an inheritance

on which the heir has not yet entered, it was more convenient for the moment to call it a person, and to estimate the rights and duties that would attach to a person so situated than to be making constant references to all the innumerable human beings who might be actually interested in the succession. The same reason applied to the practice of attributing personality to the public treasury (*fiscus*); to certain charitable foundations (*piæ causæ*);[1] and even to an estate to which an easement attaches as against an adjoining estate.[2] The fiction was somewhat less strained in the case of the person of the emperor and of certain magistrates who were severally regarded as forming, in combination with the line of their successors, one integral person.[3]

L. 22, D. (xlvi. 1).

[1] L. 19, C. (i. 2). L. 46, C. (i. 3).

[2] L. 1, § 43, D. (xliii. 20).

[3] L. 56. D. (xxi. 1). L. 25, D. (l. 1).

The most important class of fictitious or artificial persons was those assemblages of natural persons, determinate or indeterminate as the case might be, to whom, for purposes of public policy, the law accorded the peculiar right of acting in certain capacities as a single natural person. The origin, history, and objects of these associations were manifold; the only facts in common to all of them being that, in contrast with an ordinary partnership, the rights and duties, and even the will of the individual members in respect of the subject-matter of the association, were merged in the personality of the whole; and that the organization and government of the association were determined by law, and not by private agreement. In the case of all but a very small class of these associations, moreover, there was some object contemplated by law, independent of the pecuniary interest of the associating persons, and this object took precedence of all considerations of such interest. Furthermore, all the individual members might be changed, or even reduced to one, and yet the legal artificial person might still subsist.

L. 7, § 2, D. (iii. 4).

These associations, incorporated by law (variously designated as *collegia, universitates,* and *corpora,* as opposed to a *singularis persona*), belonged to the following leading classes:—

(1) The urban communities of various kinds, small and great (*civitates, municipia, coloniæ, vici*), as well as their local governing boards (*curiæ, decuriones*).[1]

(2) Religious confraternities (*collegia, templi*).[2]

(3) Public functionaries, *e.g.* scribes, and other partly private and partly public officers.

(4) Guilds of fellow-craftsmen, *e.g.* smiths, bakers, and mariners.[3]

(5) Friendly clubs, which often served religious and political objects, and were, therefore, jealously watched by the government.

(6) Associations formed only for purposes of gain. Such were the societies for farming the public revenues, for working gold, silver, and salt mines, and the like.

[1] L. 7, § 2, D. (iii. 4). L. 73, § 1, D. (xxi. 1).

[2] L. 38, § 6, D. (xxxii. 3).

[3] L. 1, pr. D. (iii. 4). L. 5, § 12, D. (l. 6).

L. 1, D. (xlvii. 22).

L. 9, § 1, D. (iv. 2).

Rights and Duties of Corporations.

The general rights of corporations in respect of ownership, possession, obligations, and actions were, in Justinian's time, the same as those of natural persons, except where the absence of the facts of family life and of the peculiar incidents of humanity (as birth, death, and marriage) destroyed the analogy between artificial and natural persons. With this exception, the differences between the rights and duties of corporations and those of natural persons were the following :—

(1) In respect of *usufruct*, or the rights of using and taking the fruits of what was owned by another, the duration of such a right was limited to one hundred years.

L. 56, D. (vii. 1).

(2) In the case of a township (*civitas*) making a contract of loan, in which an equal quantity of things of the same kind and value is to be returned to the lender (*mutuum*), the township is only bound so far as the loan is really to its advantage.

L. 27, D. (xii. 1).

(3) A corporation could not be sued for fraud, but its individual directors could, and its corporate acts might be set aside on the ground of undue pressure exercised by it.

L. 15, § 1, D. (iv. 3). L. 4, D. (xliii. 16). L. 9, § 1, D. (iv. 2).

(4) Certain corporations had specially granted to them the right to succeed on an intestacy, and in priority to the public treasury, to the property of their deceased members. C. (vi. 61).

(5) The rights of corporations to enter on an inheritance, as *heir*, to take a legacy, and to benefit from a trust under a will (*fideicommissum*), were all generally recognized in Justinian's time, but it was only by gradual legislative efforts in imperial times that this had been fully brought about. Ulpian denied the right of towns to be heirs, except in the case of the property of their freedmen.[1] The right was conceded to towns by the Emperor Leo I., in A.D. 469.[2] Even in Justinian's time it would seem that the old general rule of Hadrian's day was still in force, that a "*collegium* could only take an inheritance when specially privileged to do so."[1] Nerva and Hadrian (A.D. 96–138) permitted *legacies* to be made in favour of towns,[2] and Marcus Antoninus (A.D. 138–161) extended the right to all legally constituted corporations.[3] The validity of a *trust* under a will in favour of a town was first recognized by a *senatus consultum* (Apronianum) apparently passed in the time of Hadrian.[4]

[1] Ulp. (xxii. 5). L. um., § 1, D. (xxxviii. 3).
[2] L. 12, C. (vi. 24).
[1] L. 8, C. (vi. 24).
[2] Ulp. (xxiv. 28).
[3] L. 20, D. (xxxiv. 5). Gaius (ii. 195).
[4] Ulp. (xxii. 5). L. 26, 27, D. (xxxvi. 1).

Internal Organization of Corporate Bodies (*Collegia*).

The typical organization of bodies incorporated for purposes of self-government and of the conduct of external relations was a municipality. In a municipality the government or representation of the whole body was entrusted to the town councillors, two-thirds of whom must be present at the time of doing any corporate act, to which a majority of those present must assent. There was a corporate chest and corporate property; and the directors were represented in their litigation and other official acts by a

L. 1, § 1, D. (iii. 4).
L. 2, 3, D. (l. 9). L. 46, C. (x. 31).

permanent agent (*syndicus*), or by one appointed for the particular occasion (*actor*). In the case of other corporate bodies, all the members shared equally in the government, or, at least, could by vote (within certain legal limits) make the internal constitution of the body what they pleased. This provision is said by Gaius to be a transcript of a law of Solon's, of which he professes to translate the exact words.

L. 4, D. (xlvii. 22).

Creation and Extinction of Corporate Bodies.

It would seem that three persons were sufficient and necessary number to constitute a corporate body, though, as has been already noticed, the corporation was not extinct, even though the number is subsequently reduced to one. A corporate body always drew its existence directly from the act of the executive government, or of the legislature; though, when the purpose of a corporate body was not among those classed as illegal, or was among those classed as legal, the act of authorization was presumed. Corporate bodies came to an end by (1) the time for which they were authorized running out; (2) withdrawal by the State of its authorization, whether express or implied; (3) the death or withdrawal of all its members; (4) a resolution of the members of the association.

L. 85, D. (l. 16).

L. 1, D. (iii. 4).
L. 3, § 1, D. (xlvii. 22).
Arndts, § 44, obs. 4.

On the dissolution of a corporate body, it would seem that the destination of the property was fixed by the State —that is, by the executive government acting through the judicial authority in conformity with well-established principles—except in cases where the paramount object of the corporate body was pecuniary gain. In these cases it is probable that the members themselves fixed the destination of the property when it was by their will that the dissolution took place; and when they did not fix it, or when the dissolution took place against their will, an equitable distribution among the members was made by the judicial authority. Provisions for this distribution might be contained in the articles or "statutes" of the association.

§ 2.—*Things.*

One of the main purposes of law is to settle the competing claims of persons to portions of the material universe. These become "property," and the appropriation of them is the subject-matter of "contracts." In either case law is called upon to ascertain the rights of the parties; to prevent, by anticipation, the controversies which might otherwise arise; or to determine them, by a judicial sentence, after they have arisen. Thus law has a main concern with these material objects or *things*, so far as they are susceptible of complete appropriation or even of momentary possession.

The rules of law which apply to different classes of things have in all countries grown partly out of the various physical nature and capabilities of the things themselves, and partly out of historical, political, and social accidents which have led to the thing being impressed with a special juridical character based upon the possibilities and modes of its being owned and transferred. Physical and juridical classes are seldom co-extensive; in other words, the limits of a class based on the physical features of things seldom correspond precisely with the limits of a class marked out by historical development or juridical symmetry; and therefore law has arbitrarily to determine what things do, and what do not, fall within the juridical class.

Before examining the chief classes into which things were distributed in Justinian's time, it must be noted that the word *res*, like the words *sache* and *thing* in German and English, had a wider meaning, besides the narrower and stricter meaning of a sensible and material object. There were "incorporeal" as well as "corporeal" things; incorporeal things including such groups of rights as are implied in an inheritance, an obligation, a right of using and taking the fruits (*usufructus*), a right of guardianship. *Res* or *thing*, in this sense, was only a convenient term to signify an integral group of rights which, for the moment, by the act of the imagination, are treated as consolidated into a material substance,

L. 2, J. (ii. 2). Ulp. (xix. 11).

and as becoming objects of rights outside themselves. An inheritance, for instance, like the true corporeal things which enter into its composition, may be acquired, lost, or transferred, as may also an obligation and an usufruct, and thus the analogy between these composite rights and material things is not wholly forced and unnatural.

I. The broadest and the most important of all divisions of things was that between things susceptible of appropriation by private persons and things not so susceptible (*in nostro patrimonio, in commercio, extra patrimonium nostrum, extra commercium*). Things which were not susceptible of appropriation by private persons were:

L. 6, D. (xviii. 1). L. 1, § 2, D. (xx. 3).

(1) Things common to every one (*res communes*), as air, flowing water, the open sea, and the sea-shore. These things were not appropriated even by the State, though the use of them, as, for instance, in case of building temporarily on the sea-shore, was regulated by law.[1] The inland limit of the sea-shore was the highest line to which the tide reached in winter.[2]

[1] L. 14, 50, D. (xli. 1).
[2] L. 3, J. (ii. 1).

(2) Things set aside for peculiarly solemn uses (*res divini juris, res nullius*). These things were, in fact, withdrawn from the general market and set apart by the State for sundry purposes recognized as of supreme importance, whether of a practical or purely sentimental kind. These things were subdivided into i. "sacred," ii. "religious," and iii. "sanctified" (*sanctæ*).

(i.) "Sacred" things were things which had been publicly and solemnly devoted to the service of God, as churches, offerings, and vessels used in divine worship. They could neither be owned, possessed, alienated, hypothecated, or pledged even by the ministers of religion, except in case of extreme necessity, as for the redemption of captives.[1] Ecclesiastical property, that is, property vested in the Church, was not included among sacred things, though it could only be alienated and mortgaged with special formalities.[2]

[1] L. 8, J. (ii. 1). L. 30, § 1, D. (xli. 2). L. 9, D. (xli. 3). L. 21, C. (i. 2). Nov. (cxx. 10).
[2] L. 14, 17, C. (i. 2).

(ii.) "Religious" things were places in which dead bodies (or, at any rate, their heads) were buried by persons legally entitled to use the places for such a purpose. Such a place was incapable of being possessed or owned so long as the remains continued there; but if the remains were removed by authority, the place lost its religious character; and if the place was occupied by an enemy, its religious character—as well as the sacredness of "sacred" things in the same predicament—was in suspense.[1] The right to inter a dead body was a private right which was capable of being transferred.[2]

L. 9, J. (ii. 1). L. 2, C. (iii. 44). L. 44, pr. 1, D. (xi. 7).

[1] L. 36, 44, D. (xi. 7).

[2] L. 14, C. (vi. 37).

(iii.) "Sanctified" things were the gates, walls, and ramparts of the city, which it was a capital offence to injure or even to treat contemptuously.

L. 8, 9, 11, D. (i. 8).

(3) Public things (*res publicæ*)—that is things appropriated by the State for the general use of all persons or the public service, such as the larger rivers which were never dry, ports, public squares, edifices, streets, and roads, and the banks of public rivers so far as their use for navigation went. These things were protected from injury by the executive authority. No person could appropriate them, but every one could, in subordination to the claims of the Government, use them.

L. 4, J. (ii. 1), D. (xliii. 12), D. (xlii. 11).

(4) Things belonging to a municipal corporation (*res universitatis*), for the common use of the citizens, as theatres, race-courses, public slaves, and the like. These things were vested in the municipal body, which might make what arrangements it pleased for the effective and equal enjoyment or use of them by all citizens.

L. 6, pr. D. (i. 8).

All other things were susceptible of appropriation by private persons (*res singuloram*).

II. When once the line is clearly and finally drawn between the classes of things which can be appropriated or possessed by private persons and those which cannot, it may be laid down that the part of the law which

determines the rights and duties of private persons (sometimes called "private law") has only to do with those things which are susceptible of appropriation or possession by private persons. The different physical qualities of these things have, in fact, gone far to determine the rights and duties of persons in reference to them, and for this reason it was held convenient in Roman law to treat things under those various physical aspects which impressed the most distinct juridical destination upon them.

(1) Things Movable and Things Immovable (*res mobiles* and *res soli*).

The immovability of things does not seem to have at first attracted the attention of Roman lawyers so much as the fact of some things being part of the national soil or very closely attached to the soil, whether by growth or close physical adhesion, as is the case of trees, standing corn, minerals, and permanent buildings. Of course these things were immovable as well as connected with the soil, but the prominent fact which arrested attention in respect to this class of things was this lasting connection with the soil, while the class of things opposed to them was recognized as simply movable or as moving themselves. The direct opposition, however, of movable and immovable things appears in the code especially in relation to prescription, and it has become the most fixed one in modern Roman law. The words *fundus* and *prædium* were used in a broad generic sense, like the English words "land" and "estate," which may be taken as approximate translations of them. Thus under the name *fundus* was included land, with all the permanent buildings upon it and the things which naturally or artificially adhered to it. Under the name *prædium* was included both land devoted to culture (*prædium rusticum*), and land, wherever situated, in town or country, with buildings upon it, or, at least, not cultivated (*prædium urbanum*).

L. un., § 1, C. (vii. 31).
L. 2, 3, C. (vii. 37).
L. 198, 211, D. (l. 16).

In drawing a line between things movable and things

immovable, the difficulty chiefly arises in respect of things which are not generally or frequently moved, but which are in fact movable, with greater or less detriment to the ground or buildings to which they are attached. These questions were solved, in practice, in Roman law, as in modern systems of law, by arbitrarily ranging certain doubtful things in the class of movables or immovables, not with reference to fine considerations of their physical qualities, but with reference to the juridical result of the arrangement. Thus the treatment of this class of questions belongs to that of the purely arbitrary classification of things into "principal and accessory."

(2) Things Principal and Things Accessory.

There were some things the legal destination of which, as affecting the rights and duties of persons, was determined by their casual connection with other things, whether as being joined to them by intimate physical union or as being habitually and exclusively used as auxiliaries to the use of those other things.

Among things regarded as physically joined to other things and partaking of their legal attributes were trees, plants, and fruits generally, while not separated from the soil;[1] and accretions, alluvions, and buildings erected upon land which could not be easily removed (*superficies*).[2] Among things habitually and exclusively used as auxiliaries to the use of other things were things placed on land solely with a view to its better cultivation, as straw and manures; but not cattle or implements of husbandry, because they were regarded as not subserving, or at least as not essential to serve the primary purpose of the land (*instrumentum fundi*), and would vary with the enterprise or wealth of the cultivator.[1] Among the class of things regarded solely as appurtenances were drains for water, covers for wells, keys and locks or padlocks not attached.[2] But all that belonged to the trade and profession of

[1] L. 44, D. (vi. 1). L. 40, D. (xix. 1).

[2] L. 50, D. (ix. 2).

L. 17, § 2, D. (xix. 1).

[1] L. 14, D. (xxxiii. 10).

[2] L. 12, § 24, D. (xxxiii. 7).

him who inhabited the house, as well as all that was there for his personal convenience, or for mere ornament, or which would serve for one house as well as for another (*instrumenta domus*), were not reckoned in the class.[1] Things movable were auxiliaries of other things of the same character when they were solely destined to subserve the purposes of the principal objects; as, the keys of a chest, the frame of a picture, the sheath of a sword, or the bottles containing liquor.[2]

[1] L. 245, D. (l. 16).

[2] L. 4, pr. D. (xxxiii. 9). L. 12, § 9, D. (xxxii. 1).

Fruits were said to be either *natural* or *civil;* civil fruits being only an analogous extension of the term *fruits* to signify the advantages appreciable in money, which the use of anything procured or produced periodically for the benefit of the owner of the thing, as, for example, the labour of slaves, rent, interest, and the price of carriage by ships and beasts of burden. Natural fruits include not only those things which are produced by physical growth, vegetable or animal, but also all things which are periodically or constantly procured by men's labour from some other things which are not seriously impaired or lessened in value through the procuring of them. Such are the lopping of trees, the products of chalk and stone quarries, and the minerals extracted from mines.

L. 34, D. (xxii. 1.) L. 29, D. (v. 3).

L. 12, 14, D. (xxiv. 3).

(3) Things Fungible and Things not Fungible.

There are some things which are individually determined, and which, if they become the subject-matter of a contract, a transfer, or a succession, do not admit of any substitute being found for them, even though the proposed substitute be equivalent in kind and in pecuniary value. There are other things in respect of which—when the above purposes are concerned—note is taken only of their quality and quantity; and any individual thing in a class is treated as equivalent to any other of the same class, and as an adequate substitute for it. The best instance of the latter class of things is money, one piece of money being always interchangeable for another of the same

L. 54, pr. D. (xlv. 1). L. 29, D. (xlvi. 3).

value, so long as the pieces are treated purely as money. Of course, things which usually admit of being interchanged may, by especial description, become specific; as bottles of wine may be described as being in a certain cellar, or marked with a certain stamp, and even money might be described as being in a certain chest. In these cases the bottles of wine and the sum of money are individually determined, and no substitutes for them are admissible.[1] In the case of the Roman contract of *mutuum*, the things which were the subject-matter of the contract were always individually interchangeable with other things for the purpose of fulfilling the contract.[2]

[1] L. 37, D. (xlv. 1).

[2] L. 2, § 1, D. (xii. 1).

(4) Things Consumable by Use and Things not so Consumable.

Some things can only be turned to their appropriate use by being parted with, or by losing some portion of their substance. Such things are wine, oil, and provisions generally, clothes, and coined money.[1] Other things may, indeed, be deteriorated by long use, but are not necessarily worn out or destroyed by it. This difference of quality especially affected the extent of the right of using a thing (*usus*), and also the liabilities of persons accountable for the custody or delivery of a thing.[2]

[1] L. 2, J. (ii. 4). L. 5, § 1, L. 7, D. (vii. 5).

[2] L. 15, § 4, D. (vii. 1).

(5) Things Divisible and Things Indivisible.

Though, as a scientific fact, all material things are indefinitely divisible into fractional parts, yet it can seldom happen that, on a division taking place, all the parts are of equal economical value, and the sum of the parts exactly equal in value to the whole undivided thing. Some things, again,—as a slave, an animal, and even a machine, or a piece of land containing different soils and aspects,—could not be divided into parts without either a complete loss of the original quality to which their value is due, or a change of quality, or a resulting inequality in the value of

the parts. On these grounds it was noted in Roman law that there were some things which were "naturally indivisible, or which could not be divided without loss or destruction." Thus, whether, for such judicial purposes as that of settling the claims of joint proprietors or beneficiaries under a will or a trust, a thing should be treated as physically divisible, and, if so, on what principles the division should take place, was a matter of purely positive law; and the logical classification of things into *divisible* and *indivisible*, like the other juridical classifications already noticed, was a merely arbitrary one, though based on actual physical facts.

L. 26, § 2, D. (xxx. 1). L. 35, § 3, D. (vi. 1).

Generally speaking, immovable things were regarded as divisible, and movable as divisible or not according to their character. It was always possible, however, that a house or building could not be divided into parts, though land generally could, albeit the parts, if equal in area, would not always be of equal value. When things were indivisible without change of nature or serious loss of value, or where, on the whole, it was not expedient to divide them, one of two courses was resorted to. Either the whole thing was given to one person, and he was required to make pecuniary compensation to the other persons jointly interested with himself; or the whole thing, and every part of it, yet undivided, was regarded as owned by all the persons interested, and the resulting advantage, proceeds, or income, of it, was proportionably divided amongst all. The shares of the interested persons were called "undivided parts," and part ownership of this kind was, in the eye of the law (*juris intellectu*), opposed to ownership of a part resulting from corporeal division (*divisione corporis*). In both these cases the rights were treated as divisible, but not always the things themselves.

L. 6, § 1, D. (viii. 4).

L. 5, D. (xlv. 3). L. 66, § 2, D. (xxxi). L. 5, § 15, D. (xiii. 6). L. 54, pr. D. (xlv. 1).

Another celebrated distinction among things requires to be here adverted to, as it greatly coloured the history of Roman law, though it had practically vanished by Justinian's time, and the last traces of it were swept away by

one of his constitutions. This was the distinction founded on the fact that some things could only be transferred by a sort of fictitious sale, called mancipation, while all other things (that is, things properly so called, and not merely rights to things) could be transferred by simply handing them over. To the former class (*res mancipi*) belonged the things which, in primitive Rome, were doubtless the chief or only objects of judicial controversy, such as land and houses or permanent buildings in Italy, slaves, and domesticated animals. All other things could be transferred by simply handing them over (*res nec mancipi*).

Gaius (i. 119, ii. 18–23).

As in the case of persons, so in the case of things, it is often convenient to contemplate as a single thing a number of things having certain relations to one another. These things are usually of the same kind, and have a common economical destination or purpose. The unity continues to subsist, despite the change of all or the loss of some of the objects of which it is composed. An "university" or aggregate thing of this sort (*universitas facti sive hominis*), —as a flock of sheep—must be distinguished from an assemblage of things corporeal and (so-called) incorporeal, that is, rights in things treated for juridical purposes as an integral whole (*universitas juris*). Such was the private property which a soldier retained, independently of paternal control (*peculium castrense*). In the case of a *hereditas*, the idea of an university seems to have been on one side, that of a corporeal person in whom the rights and obligations centred, and on the other, that of an assemblage of things, the subject-matter of the rights and obligations. The two conceptions in reference to persons and things respectively here met together.

L. 22, D. (xxx. 1).

L. 20, § 10, D. (v. 3).

§ 3.—*Acts, in Reference to the Creation, Extinction, and Exercise of Rights, and to the Performance of Duties.*

All laws are directed to the control of the acts of persons, commanding them to do certain acts and to abstain from doing others. It is, again, by the doing of certain acts that many rights arise, are extinguished, or are exercised or enjoyed. Thus, whether in reference to duties or to rights, the discrimination of persons' *acts* is one of the most prominent topics of legislation and judicial inquiry.

For the purposes of jurisprudence, every act may be resolved into (1) a muscular motion, (2) will, and (3) an intention. The will and the muscular motion together constitute the essence of the act, while the intention imparts to it its quality, kind, character, and limits. The *intention* may be briefly defined to be the "attitude of the agent's mind at the moment of acting, in respect of the immediate consequences of the act." Thus, intention includes aimlessness, or vague, unthinking, purposelessness.

Acts have consequently to be tested, first, as to their *validity*, and, secondly, as to their *character*.

I. The *validity* of acts.

1. The person acting must not belong to a class of persons held in law to be presumably incapable of doing a valid act of any sort, or, at least, of the sort under consideration.

2. The person acting must not be disqualified to do a valid act of any sort through the presence of an impediment belonging to one of certain well-recognized classes of impediments.

(1) The classes of persons presumably incapable of acting in certain cases were (*a*) *persons under age*, (*b*) *women*, (*c*) *lunatics*, and (*d*) *prodigals*.

10 J. (iii. 19). L. 1, § 12, 13, D. (xliv. 7).

(*a*) *Infants* under seven years of age, persons under fourteen years of age, and persons between the ages of fourteen and twenty-five. The amount of disability in these several cases, and the devices for remedying the public and private inconve-

nience which might spring from it, belong to the subjects of tutelage and guardianship (*tutela* and *curatela*) and of summary prætorian remedies (*restitutio in integrum*), which will be treated fully in their proper place. (See Chap. v.)

(*b*) *Women* in certain cases. The disabilities attaching to women have already been treated of under the general head of sex, as a qualification of persons.

(*c*) *Lunatics* (*furiosi dementes*) and persons otherwise disqualified by bodily infirmity, such as the deaf and dumb, so long as the condition of lunacy or other infirmity actually subsisted, and to the extent that it really disqualified the sufferer for the purpose in hand.[1] A sudden fit of passion operated while it lasted in the same way as madness.[2] This topic will be treated more fully under the general heading of guardianship (*curatela*).

[1] L. 48, D. (l. 17).
L. 7, 8, J. (iii. 19). L. 1, § 14, 15, D. (xliv. 7).
[2] L. 17, D. (xxviii. 1).

(*d*) *Prodigals*, that is, persons whom the prætor removed from the administration of their own affairs, on the ground that they were wasting the family property that had descended to them, in such a way as to ruin their successors. They were treated as lunatics, and a guardian was appointed.

D. (xxvii. 10), C. (v. 70).

(2) The recognized classes of impediments to doing a valid act, on the ground of their obstructing muscular motion, unduly weighting the will, or perversely misdirecting the intention, were *ignorance*, *fraud*, and *force*.

(*a*) *Ignorance*. A distinction was drawn between ignorance of a matter of fact and ignorance of the state of the law as affecting one's own rights and duties. The broad rule was, that the former sort of ignorance was held excusable, but not the latter sort. But ignorance as to matter of fact, in order to be excusable, must not be of a peculiarly gross kind. A certain, but not an excessive, amount of diligence in obtaining pertinent information was looked for. In respect of questions of law, the ignorance or error was only excusable in cases where the immediate purpose of the person pleading

L. 2, 3, D. (xxii. 6).

L. 9, § 2, D. (xxii. 6).

it was to save themselves from loss, and not to make some fresh gain;[1] and only certain classes of persons were enabled to plead it at all. These classes were persons under twenty-five years of age (except as to their illegal acts); women, soldiers, and persons of rude and uncultivated intellect (*rusticitas*).[2]

[1] L. 8, D. (xxii. 6).

[2] L. 9, pr. D. (xxii. 6). L. 22, pr. C. (vi. 30). L. 8, C. (vi. 9). L. 2, § 7, D. (xlix. 14).

(*b*) *Fraud.* When a person is deceived by another as to the nature or the consequences of his acts, whether through insidious craft, mis-statements, untrue insinuations or wilful suppression of relevant facts, the victim of the deceit (*dolus malus*) was relieved of the whole or the part of the consequences of his act, as against the author of the deception. The relief was accorded either by a plea (*exceptio*) tendered in the course of the trial, or by an action (*actio doli* or *de dolo*).

L. 1, § 2, D. (iv. 3). L. 43, § 2, D. (xviii. 1). L. 5, C. (iv. 44). L. 4, § 33, D. (xliv. 3).

(*c*) *Force.* The presence of force, or the menace of immediate force, impairs the freedom of the agent's will, and thereby converts what otherwise would be an act into a necessary event. Relief against the consequences of acts done under the pressure or apprehension of force was granted either by action or by plea, and the acts were thereby rendered invalid for all purposes and as against all persons. The apprehension must not be that of an exceptionally foolish or nervous person and it must extend to the life, person, liberty, or honour, of the person pleading it. The violence threatened must be such as it is meant positively to inflict in case of non-compliance, and the threat must proceed from the person who has direct control over the force which is to be exerted. Even when these conditions, however, were not satisfied, other legal remedies of a more or less extensive nature relieved those who acted under fear. There was an amount of pressure intermediate between violence and fraud, and which may be described as "undue influence," which invalidated acts and gave occasion for the return of money paid, or even for a considerable fine by way of penalty.

D. (iv. 2). L. 4, § 33, D. (xliv. 3).

D. (iii. 6). L. 2, 4, § 2, D. (xii. 5).

II. The *character* or *quality* of a legal act.

It was sometimes convenient to characterize and classify acts by reference to the immediate causes from which they sprang, the circumstances which surrounded them, and their immediate consequences.

(1) Thus some acts, such as testamentary dispositions, the occupation of ownerless property, the acceptance or refusal of an inheritance, the management of business, a mere promise, implied the presence of a single agent and no more. Other acts, including every species of agreement and contract, and most modes of transferring property, implied the presence of two agents or more.

(2) Some acts simply procured an advantage (*gratuita, lucrativa*); other acts either procured no advantage, or only procured one in return for a proportionate sacrifice (*onerosa*).

(3) Some acts were done wholly in view of the interests of the living agent and in sole contemplation of life; other acts were done in contemplation of the death of the agent and in view of the interests of various representatives of him when he shall be dead (*inter vivos* and *mortis causâ*). L. 25, D. (v. 2).

(4) Some acts were done in pursuance of the rules of the *jus civile*, and others of those of the *jus gentium;* some acts were based on the strict letter of the law, and some on good faith (*stricti juris, bonæ fidei*); some acts required formality and precision in their execution, and others did not (*solemnia, munus solemne*); some acts concerned the alienation or transfer of rights to another, other acts only concerned the renunciation or surrender of a right without imparting any title to another person (*alienatio* and *renunciato*). The general rule was, that in the case of a right not yet acquired, a formal renunciation of it bound the person making it and was irrevocable. L. 4, C. (vi. 31). L. 1, § 6, D. (xxxviii. 9).

An act was especially a manifestation of the agent's will. But there were cases in which a manifestation of will was conveyed, or was presumed by law to be conveyed, by mere abstinence from action. Thus, consent might be

tacit as well as express, in cases where a legal or a moral duty of speech lay on the person who intended not to consent. This was especially the case when the condition of persons was involved, as on parental consent to a marriage. So also certain rights, as servitudes or easements, might be lost by mere abstention to exercise them for a certain length of time; and rights might be retained by mere continuance of exercise, as in the case of holding over on the expiration of a lease.

L. 142, D. (l. 17). L. 7, § 1, L. 12, D. (xxiii. 1).

L. 13, § 11, D. (xix. 2).

Generally the will might be manifested by any mode of communication which was practically effective for the purpose, as by speech, by gesture, by writing, or by signs; but in certain cases the law determined beforehand the specific acts which would alone be accepted as sufficient manifestations of will, and, in other cases, imposed additional and special formalities which must be annexed to the essential act. In some cases, formal words and gestures; in many cases, writing; in some, "tradition," or handing over a thing, or a symbolic part of it; in some cases, the attestation of witnesses; in other cases, registration by a public authority (*insinuatio*); in others, an act of judicial authority (*jurisdictio voluntaria*, as in the cases of adoption and manumission), were indispensable.

L. 38, D. (xliv. 7).

L. 2, J. (ii. 7).

Representation.

There were some cases in which an act could be effectually performed by a deputy or substitute. This substitution might be strictly limited to performing the physical movements in which the act consists, in exact conformity with the wishes and intention of the "principal," who is absent; or the substitution might extend to allowing the deputy some discretion of his own, as to when, how, and to what extent, to do acts of a certain class in the principal's name.

The first sort of substitution (*per nuntium*) was generally allowed, and was said to be only "ministerial." The second kind was allowed

L. 15, D. (xiii. 5).

only on certain restrictions, which there had, however, in imperial times been an increasing tendency to relax. Corporate bodies and wards of different kinds were, of course, represented for almost all purposes by their proper official guardians. For all purposes of acquisition every one was effectually represented by his children, slaves, and other persons, whether really free or not, whom he *bonâ fide* held in his possession as slaves. The broad and earlier rule was, that no acquisition could be made by a free person for the benefit of another. But this rule was more and more qualified through the well-recognized practice, fortified by the imperial legislation, of allowing the appointment of a special agent or "procurator," charged with a greater or less amount of responsibility, and with respect to a single piece of business or to all the business affairs of the principal.

J. (ii. 9).

L. 2, C. (iv. 27). L. 3, J. (ii. 9). D. (iii. 3).

The agent so appointed might, in Justinian's time, not only acquire possessions and rights of ownership generally for the benefit of his principal, but might acquire rights of pledge and mortgage, and rights of action generally. He could be appointed in the most informal or indirect way, differing therein from the earlier *cognitor* or attorney-at-law, who could only be appointed by certain formal words.

G. (iv. 83).

In the case of a person undertaking the affairs of another (*negotiorum gestio*), whether for his benefit or otherwise, without express authorization, a subsequent approval of what had been done produced a retro-active effect and assimilated the act to one done with his previous consent.

L. 7, C. (iv. 28).

Illicit Acts and Omissions.

Besides the acts out of which rights arose, by which they were exercised, or through which they were terminated, there were acts (or omissions, which are, in truth, only acts looked at from another side) which violated the rights of other persons, however those rights were grounded. These

illicit acts proceeded either from a distinct intention of doing wrong (*dolus*), or merely from an absence of that mental alacrity and attention which in the special circumstances the law demands (*culpa*). The amounts of mental alacrity and attention demanded by the law in different circumstances were broadly distinguished into that the absence of which constituted a grave delinquency and that the absence of which constituted a light delinquency (*culpa lata, culpa levis*). Even a third form of delinquency, the lightest of all, is noticed in one passage of the Digest (*culpa levissima*).

L. 44, D. (ix. 2). A positive, though rough, judicial test for the purpose of measuring delinquency was supplied by the care and attention the person concerned habitually bestowed on his own affairs, or, where this test was not applicable, by the care and attention which an average man of business bestows on his own affairs. Thus, a grave delinquency was where a want of attention was manifested, which almost every one in such a case gives; and also where a person, who is bound under the circumstances to bestow special attention, fails to bestow as much attention on the affairs of another as he habitually does on his own (*culpa lata in concreto*). A light delinquency is when a person, not bound to bestow any special degree of attention, fails even to bestow as much as people usually do in respect of their own affairs, or, at least, as much as he generally does in respect of his own affairs. The degree of attention demanded by law in special cases and, therefore, the question of liability only for malice, as also different degrees of carelessness, will be treated in later chapters.

L. 32, D. (xvi. 3).

L. 65, pr. D. (vii. 1). L. 72, D. (xvii. 2). L. 17, D. (xxiii. 2).

Nullity of Acts.

After an act had been done and some of its consequences had followed, it might (1) be found that some legal infirmity had attached to the performance which rendered the act invalid; and this infirmity might extend to the capacity

of persons, the quality of things, or the formality and legality of the transaction as a whole. Or, (2) subsequent events might happen which might render invalid an act which had been originally valid. Thus, the change of *status* of a testator, or even an increase in his family, might have the effect of rendering nugatory a previous will.

The nullity or original invalidity of an act was either such that any one affected by it might invoke it, or only such as could be invoked by particular persons in whose favour it was recognized. An instance of this last case is where one contracts with a ward without his tutor's authorization. The act is null whenever the ward or his tutor chooses to disclaim it, but not otherwise. L. 13, § 29, D. (xix. 1). So also there were cases in which notice of termination of partnership given to the agent of the other partner rendered the partnership non-existent so far as the partner giving it was concerned, but so far as the other partner was concerned only if he ratified his agent's act of accepting the notice. It depended on his arbitrary will whether the act of dissolution should be null or not. L. 65, § D. (xvii. 2). Where the nullity was such that it might be invoked by any one concerned who pleased, no mere lapse of time could cure the original defect. In the other case, lapse of time might raise a presumption that the person entitled to interfere consented to acquiesce. L. 201, 202, D. (l. 17). In the case of a complex transaction consisting of many distinct acts, the nullity of those acts, which were the fundamental or essential part of the transaction, imported the nullity of the whole. L. 178, D. (l. 17). The nullity of merely accessory or independent acts affected those only, and not the rest. L. 1, § 5, D. (xlv. 1).

There were cases in which an act was presumptively valid and not tainted with any inherent infirmity, and yet, for reasons of public policy, a right was accorded to certain persons, in certain clearly defined circumstances, of impeaching its validity. Obvious instances are supplied by the case of discovering a latent defect in a purchase, of impeaching a will through want of a fair provision for natural claims (*querela inofficiosi*), and revoking donations on

the ground of ingratitude. In such a case the act, up to the time of its being impeached, produced all its natural consequences, which were permanently good and valid, and it might be the subject of a hypothecation, a pledge, or a warranty which would be in force after the act itself was annulled. In these respects it differed from an act which was, or was declared to be, null from the first.

[1] L. 2, J. (ii. 7). [2] L. 10, C. (iv. 44). L. 43, § 8, D. (xxi. 1). L. 6, D. (xlv. 1). L. 11, § 3, D. (xiii. 7).

Interpretation of Acts.

It sometimes happens that after an act has been done, carrying with it certain legal consequences, a doubt arises as to what was its precise nature. This doubt may be occasioned in more ways than one. It most frequently arises from such causes as the absence or forgetfulness of witnesses, the imperfections of language and carelessness in its use, or the inherent vacillation or uncertainty which attended and qualified the performance of the act itself. However the doubt arises, it must, for judicial purposes, be set at rest, and this was effected in Roman law, partly by common logical processes clothed with a special legal sanction, and partly by arbitrary presumptions raised by law for purposes of public policy.

Common logical processes prescribed by law were such as the suppositions (1) that, in the use of language, a person employs words in their customary and local sense, but that this principle is not to be applied too rigidly, nor to all documents equally, some, such as wills, being usually less formal in their terms than others;[1] that (2) a person doing an act of a certain character designs to do it effectually;[2] that (3) in an one-sided act the doer of it designs to bind himself as little as the nature of the act admits; and that (4) in an act to which two persons are parties, and from which reciprocal obligations arise, he who takes the principal part is responsible for any inaccurate or defective expression.[3]

[1] L. 96, D. (l. 17). L. 69, § 1, D. (xxvii. 1) (3).
[2] L. 12, D. (xxxiv. 6).
[3] L. 34, D. (l. 17). L. 39. D. ii. 14). L. 172, D. (l. 17).

In other cases of doubt, arbitrary presumptions were raised by law in favour of maintaining grants of *liberty*, of supporting the interests of women in respect of *dowry*, and of furthering the obvious wishes of *testators*.

L. 179, D. (l. 17). L. 35, D. (l. 17). L. 12, D. (l. 17). L. 24, D. (xxxiv. 5).

It was always in the power of persons who performed an act to make, at the time of performing it, such protestations or reservations as would exclude certain interpretations of it, so far as these interpretations depended on their own manifest intention.

Modifications of Acts.—Conditions, Charges or Restrictions, Time.

A legal act has always two distinct classes of consequences closely connected together: one, a class of necessary physical consequences; the other, a class of arbitrary legal consequences. The latter are entailed by direct operation of law, as qualified by the will of persons expressing itself conformably to rules of law, and within the limits prescribed by law. In Roman law, the will of persons could modify the ordinary legal consequences of acts in three ways: first, by inserting a condition; secondly, by adding an express charge or restriction (*modus*); and, thirdly, by imposing a limit in respect of time.

(*a*) *Conditions.* A *condition* was a future and uncertain fact (act or event) on the performance or happening of which the legal consequences of a present act were made to depend. This definition excluded (1) facts which were either past or accomplished at the same moment as the act in question, though the parties may have been ignorant of this;[1] (2) facts which either must inevitably happen, or which never can happen[2]; (3) facts which are already necessary or legal consequences of the act.[3]

[1] L. 10, § 1, D. (xxviii. 7). § 6, J. (iii. 16).
[2] L. 9, 11, D. (xlvi. 2). L. 7, D. (xlv. 1).
[3] L. 99, D. (xxxv. 1).

Conditions were either (1) *affirmative* or *negative*, according as the conditional fact contemplated was to occur or not to occur. This distinction, which was mainly a verbal one, was not explicitly recognized in the language

of the Roman law writers themselves. Conditions were, again, (2) dependent on the will of the person benefited by them, or they were independent of this will, or they were partly the one and partly the other (*potestativæ casuales mixtæ*).[1] A condition could be made dependent on the mere will of the person who imposed it, but not on the acts of the person who was bound by it.[2]

[1] L. un. § 7, C. (vi. 50). See also Code Napoléon, § 1169, 1171.

[2] L. 108, § 1, D. (xlv. 1).

Conditions were, further, such as to prevent the legal consequences of an act following till those conditions were fulfilled (*conditio suspendit*), or to arrest, as soon as they were fulfilled, the legal consequences which had already begun to follow (*negotium sub conditione resolvitur*). The term "suspensive," which is sometimes applied to the former class of conditions, is misleading, as all conditions, in some way, hold in suspense the full legal nature and consequences of an act.

L. 5, C. (iv. 48). L. 2, pr. D. (xviii. 2).

There were some circumstances in which conditions could not be imposed, and there were some sorts of conditions which were in no circumstances allowable, and which ranked with conditions impossible in their very nature.

(*b*) *Charges or Restrictions* (*Modus*). The ordinary effect of an act might be qualified by the imposition of some additional duty in the nature of a charge or of a restriction. The most frequent case in which this took place was in testamentary dispositions. A testator might charge his heir with the duty of manumitting a slave or slaves, and thereby all the indispensable acts he had to perform as heir, such as entering on the inheritance and fulfilling such of the personal obligations of the deceased as descended to him, were in some way hampered with or saddled by the necessity of manumitting slaves according to the directions of the testator. The Roman lawyers took pains to distinguish between this sort of charge on the one hand and conditions and trusts on the other. From conditions they could be clearly distinguished, inasmuch as the omission or neglect of them in

no way invalidated the other acts to which they were attached. But, seeing that the performance of them could be legally enforced, the difference between them and trusts was, in fact, rather arbitrary and formal than real.

It will be seen that this charge is distinguishable from a mere wish, prayer, or recommendation, though whether an act imposed belongs to the one category or the other may be a matter of difficult interpretation, and may turn on the question—who is the person in whose favour the act is to be performed? L. 17, § 2, D. (xl. 4). L. 92, D. (xxxv. 1). L. 71, pr. D. (xxxv. 1).

(*c*) *Time.* The extent and nature of an act was, of course, limited by time. If the act in question was an insulated muscular movement, it could only be qualified, in respect of time, by taking place at one moment rather than another. But if the act were really, as is the case of most so-called acts, a more or less complex and continued series of muscular movements, then it was relevant to consider at what moment the act began and at what moment it ended; how the time between the two moments was estimated by current measurement; whether the act was really continuous or admitted of breaks and interruptions, the duration of which was not to be included in the calculation; and whether there were any other customary, accidental, or specially prescribed, grounds for extending or restricting the time and duration of the performance of the act.

(*a*) The Romans counted in the same way as modern Europeans, by years, months, and days, but not by weeks. The day was of twenty-four hours' length, from midnight to midnight, or, for some popular purposes, of twelve hours' length, loosely reckoned from sunrise to sunset. The "movable" month, as distinguished from the calendar, consisted of thirty days. When the reckoning was expressly by the calendar or "civil" time, or when no express mode of reckoning was mentioned, the day intercalated, according to the Julian calendar between the 23rd and 24th of February every fourth year, made Varro in Aul. Gell. (iii. 2). Arndts, § 88. L. 101, D. (l. 17).

no difference in the length of the month for legal purposes.

(β) In reckoning the duration of a period for legal purposes, the first and the last days were both reckoned as part of the interval of duration, and a portion of a day was reckoned as a whole day. This was an obvious convenience, as a calculation of hours and minutes would have largely increased the area of litigation. But there might be cases in which the time was reckoned with exactitude from one hour to another, or from the beginning or middle of one day to the end of another. In the matter of prescription it was expressly said that "the reckoning was not from moment to moment, but the whole of the last day was counted in." This privilege seems to have been accorded in favour of the acquisition of a right. Where a right could be lost by mere non-usage, the time would have to run out to the end of the last day.

L. 6, D. (xli. 3). L. 15, pr. D. (xliv. 3).

(γ) In calculating the lapse of time there was a distinction made between a continuous series of divisions of time, as days, months, and years, and a series not continuous. In some cases either custom or positive law recognized breaks in the duration of a period, so that there were intervals not included in the calculation. One main reason for these exceptions was the practical impossibility of doing, on days so excepted, acts which had to be performed. Thus the term *utiles* (available) was applied to days which, on one ground or another, were not so excepted, and *continui* to days which ran on without such breaks. The common grounds for recognizing days as not *utiles* or available were, (1) the fact of the magistrate not sitting; (2) the absence of an adverse party—illness, absence on good grounds, and in some cases ignorance of facts.

L. 2, § 1, D. (xxxviii. 15). L. 1, D. (xliv. 3).

(δ) The notion of immemorial time (*cujus origo memoriam excessit*) was a familiar one, especially in reference to local roads (*viæ vicinales*), barriers erected to prevent the escape of rain water (*aquæ pluviæ arcendæ causâ*), and aqueducts. It was sufficient, in order

L. 3, D. (xliii. 7).

to repel a presumption of a right being immemorial, for a witness to have heard from others who remembered its origin. The question was of some public importance, as it related to the person on whom the charge of repairing a public work could be cast, and this might depend on who originally constructed it for the benefit of his estate. L. 2, § 8, D. (xxxix. 3).

§ 4.—*Rights.*

Inasmuch as the bulk of Roman law, like all other systems of law, is concerned with describing the nature, modifications, modes of originating and of protecting rights, it is rather to the detailed treatment of the subject than to any general introductory observations that reference must be made in order to comprehend what a right, in the true and comprehensive meaning of the term, really was in the eye of the best Roman lawyers. There is no doubt, however, that the term *jus* did represent a somewhat abstract conception to the Roman lawyers; though they did not handle it in an abstract way, and most of the abstract expressions, such as *jus ad rem*, *jus in personam*, though fashioned after forms supplied in the original authorities, are really the creation of middle-age commentators, and betoken a far more advanced or reflective mode of thought than existed in Roman times.

However, the Romans recognized or created some notions respecting abstract rights, which are of permanent value for scientific law. Thus the distinction between a right good against all the world equally and a right good against a certain person or certain persons alone, which afterwards took the form of the opposition of *jus in rem* to *jus in personam*, was undoubtedly firmly held in the best times of Roman law, though the conception was in the case of neither of the opposed notions fully carried out. The *jus in rem* was little more than co-extensive with rights of ownership, instead of including, as it strictly does, rights to reputation, to titles of honour, to personal security, and to the immunity of family relationships. In the same

way the essential notion of *jura in personam* as co-extensive with obligations was firmly held, but there were large classes of *jura in personam*, such as rights in respect of guardianship, and a variety of rights arising out of judicial and *quasi*-judicial proceedings, which were never included among obligations.

The Roman conception of rights will best appear from the detailed examination of all the classes of rights actually recognized in the law.

§ 5.—*Remedies.*

The subject of *Remedies* in its general aspect will be most appropriately considered in the historical part of the chapter on Procedure.

CHAPTER II.

OWNERSHIP.

§ 1.—*Rights of Ownership Generally.*

A RIGHT of ownership is a right in respect to the use of things available against all the world. According as the right is greater or less, the use is less or more limited, is more or less well assured in point of independence, and is enjoyable for a greater or less duration of time.

The fullest right of ownership of a thing is a right to use the thing in all available ways, to part with it, and to destroy it. Such a right was called *dominium*. In Justinian's time the conception of pure ownership was reduced to a much simpler form than at, or before, the period of the great jurists. Then a distinction was drawn between the ownership which was possible in the case of lands in Italy, and of some other special classes of things (*res mancipi*), and the ownership of all other things. It was only the former sort of ownership which was called *dominium*. This distinction, however, seems to have vanished even in Gaius' time. Another distinction, also abolished by Justinian, had existed between technically completed ownership as recognized by the common law (*lex jure Quiritium*) and a certain incomplete ownership (*in bonis habere*), to which the prætor attached almost all the legal advantages of completed ownership.

Gaius (ii. 40). Ulp. 19, Cod. (vii. 25, vii. 31).

Nevertheless, in Justinian's time, it necessarily happened that the highest and simplest form of ownership was very far from being as vague and unlimited as the

term *dominium* seems to suggest; and besides ownership of the highest kind, there was a graduated list of rights of ownership differing from each other in respect of the time, the mode, and the degree, of the limitations which defined and restricted them. It thus came about that the same thing might at one and the same moment be the object of *dominium* vested in one person, and of a variety of lesser rights of ownership vested in a series of others. So far as this could be the case, *dominium* no longer carries with it that indefinite capacity of using the thing owned which is theoretically attributed to that supreme right.

Thus, in the case of a partnership, the partners cannot, indeed, all,—that is severally,—consume for their own private purposes anything forming an element of the common goods; yet, when the thing has been appropriately used by one, or some, or all, of the partners for the common object, each member of the association has his own particular rights in respect of the profits. Such a partnership was informally created by the mere accidental mixture or blending (*confusio*) of things belonging to different people. Precise rules were laid down as to how, and by whom, the resulting product was to be used, and in what way any profits arising from its use were to be distributed.

J. (ii. 1, 27 sq.).

Other essential limitations to the fullest right of ownership are due to the claims of the general community, either as grounded on the maxim—to which the prætor, by his interdict, was always ready to give effect—that every one must use his own in such a way as not to injure what belongs to some one else, or as grounded on the supreme authority of the State, exercised for the purpose of taxation, or of making roads, harbours, arsenals, and market-places (that is, of converting *res privatæ* into *res publicæ* or *res communes*).

§ 2.—*Restricted Rights of Ownership.*

The practically most important limitations on the fullest rights of ownership are those which constitute

lesser rights of ownership in other persons. Arranged in order of general importance, if not of magnitude, such rights were :—

(1) Servitudes.
(2) Usufruct.
(3) Use and habitation.
(4) Labour of slaves.
(5) *Emphyteusis* and superficies.
(6) Pledge.
(7) Dower (*Dos*).
(8) *Peculium.*
(9) Possession (as a right).

All these lesser rights of ownership were sometimes called *jura in re*, that is, rights in something the *dominium* of which was vested in some one else. L. 19, pr. D. (xxxix. 2).

(1) SERVITUDES.

A servitude is a right which exists in the case of lands or buildings adjoining each other but belonging to different owners.

The right is vested in the then owner of the lands or buildings which are thereby said to be "dominant," and is exercised against the then owner of the adjoining lands or buildings, thereby said to be "servient," and relates, in some way or other, to the use of those lands or buildings. Before Justinian's time this precise conception of a servitude does not seem to have been attained, inasmuch as servitudes are classed in the Digest, as attaching either to persons or to things, those attaching to persons including such rights of ownership as "use" and "usufruct," which could not fall under the definition of a servitude above given, and they are treated apart from servitudes in the Institutes. L. 1, D. (viii. 1).

It is a rule that a true servitude cannot consist in laying a positive duty on the owner of the servient tenement. It can only prevent such owner doing something which, but for the existence of the servitude, he would be entitled to do, or can enable the owner of the dominant tenement to

extract some advantage from the servient tenement which, but for the existence of the servitude, he could not extract.

There is a broad line of division between the different kinds of servitudes, which is natural rather than artificial. For instance, in the case of contiguous houses in towns, the only sort of advantages which the owner of one house can enjoy, at the expense of the owner of the adjoining house, is of an unbroken and continuous sort, and not of a desultory or occasional one, as in the case of the owners of adjoining lands in the country.

To servitudes in towns, called urban servitudes, belong such rights as those which forbid the adjoining owner to raise his walls beyond a certain point, or in other ways to obstruct the light, the air, or the prospect, and which oblige him to admit his neighbour to rest the beams of his house on the adjoining house, and to let fall the rain from his roofs on to the adjoining court-yard. This class of servitudes is continuous in its enjoyment, and is sometimes said to be *negative* and *continuous*, inasmuch as it does not enable the owner of the servitude to do fresh and positive acts, but merely restricts the freedom of his neighbour. Urban servitudes, though they owe their name to their origin in cities, may exist wherever two buildings are close together.

Servitudes in the country (called rustic servitudes) are such as rights of way, of carrying water, of drawing water, of pasturage, of burning lime, of digging sand, and the like. These rights are *discontinuous* and *affirmative* in their nature, in the same way in which urban servitudes are *continuous* and *negative*. The quality of continuity or discontinuity is important as affecting the sort of presumption which is raised from an abstinence from using the right when a case for prescription arises. In the case of a discontinuous servitude, it is not sufficient that the servitude should have been in abeyance for a long time together in order to annul the right. There must have been an actual interference with the exercise of the right on the part of the servient owner, and this must have been successfully persisted in for the time required by the rules of prescrip-

tion. In the case of a continuous servitude mere non-use may render the right obsolete.

A right of servitude could be constituted in favour of any tenements, either by formal engagements during life or by duties laid on the heir on death.

(2, 3, 4) Usufruct, Use, Habitations and Labours of Slaves.

Usufruct is the right of enjoying all the advantages derivable from the use of something which belongs to another, so far as is compatible with the substance of the thing not being destroyed or injured. Strictly speaking, this right could only exist in the case of things the use of which was possible without diminution in their value. But by a late *senatus consultum* what was called a *quasi-usufruct* was admitted in the case of certain perishable things, such as oil, wine, corn, raiment, and even money. In these cases an equivalent in kind and quantity was admitted to represent the things destroyed or injured by use. The *usufructuarius* could give, let, or sell to another his right, though it appears that where he transferred his right by gift, a non-user by the grantee might render void the right altogether.

Hein. El. (cccexix.).

L. 46, D. (vii. 1).

A right of usufruct was constituted either by will or by contract; and it was lost either by the death, natural or civil, of the *usufructuarius*, or by a prescription, or by merger resulting from the *dominium* and the usufruct coming into the hands of the same person.

The rights called *use* and *habitation* are distinguishable by rather a fine line from the right of *usufruct*. The nature of the right of *use* can better be understood from the instances given of it by the Roman lawyers than by any attempt at definition. The person who enjoyed the *use* of a thing had a limited right of temporary enjoyment, which in all cases excluded the right of storing up fruits, produce, the young of animals, and the like, for the purpose of general self-enrichment. He who had the *use* of a house could live

in it with his family and invite his friends to live in it too, but must not interfere with workmen engaged in repairing the building or cultivating the garden. The limits of the right of *use* seem to have been fixed by what was needed for the necessities of daily life; and when the grantor of the right had defined the extent of the *use*, no presumption of a larger *use* could be raised as in the case of a *usufruct*. The right did not carry with it the right of transferring it to another, either gratuitously or for hire.

The right of *habitation* was the right of occupying such parts of a building as were suitable for residence, and the limits of the right were marked by what was requisite for residence, and not (as in the case of a vault, a garden, or a shop) for other purposes. In Justinian's time it was settled that he who had the right of *habitation* could let it out to another and defend it by the same action at law as the proprietor of the soil could defend his right.

L. 13, C. (iii. 33).

The right to the *labour of others' slaves* was distinguishable from the *usufruct* in a slave, insomuch as that right only carried with it the right to the actual product of the slave's labour, and not to any contingent advantages derivable from dealings with the slave's *peculium* or from the increase of the slave's family. The right was greater than that of the right of *use*, inasmuch as it was not restricted to what was barely necessary for a given purpose and it could be leased out to another. This right seems to have been the same as what Gaius calls the *usufruct* in men and all other animals.

Gaius (ii. 32).

(5) Emphyteusis and Superficies.

The peculiar right called *emphyteusis* seems to have arisen out of the practice of making long leases of provincial lands belonging to the State. The practice was adopted by the emperors with respect to their own private property, and shortly became legally recognized in the case of other

private proprietors. The only restrictions on the right of the *emphyteuta*, which distinguished his right from that of the proprietor of the soil, was the liability of the former to pay a yearly rent (*pensio* or *canon*), not permanently to injure the property, and to surrender to the proprietor such accessions (like hidden treasure found by a stranger) which could not be counted among the ordinary produce. The right could be sold, mortgaged, bound with servitudes, or given away by the *emphyteuta*, and it passed to his heirs, either testamentary or intestate.

The right of *superficies*, which is analogous to that of a modern building lease, was closely parallel with that of *emphyteusis*. The property, over which the right was exercised, was the soil or structural basis on which the person who had the right (*superficiarius*) had erected a building or an extra building attached to another person's building. The only liability of the builder or his heirs was to pay a rent, to satisfy the requirements of the State, and to keep the premises in repair. With respect to the buildings erected, the *superficiarius* has all the rights of a proprietor. 7, D. (vii. 1).

(6) PLEDGE.

He who has his debt secured by a contract of pledge has certain rights in the thing pledged—whether accompanied or not by possession (*pignus* or *hypotheca*)—which constitute, in fact, a right of ownership of a limited kind, and is so much deducted from the otherwise complete right of the proprietor of the thing pledged. The extent of the creditor's right depends on the terms of the contract; but the law always presumed, in the absence of any conditions to the contrary, the right of the creditor to sell the thing pledged or hypothecated, if the debt were not paid at the time agreed upon. If a special engagement had been entered into that the thing should not be sold, the creditor could not sell, without first making three separate demands of payment from the debtor, under pain, if he neglected this formality, of being convicted of theft. The creditor had to wait two years L. 45, D. (xiii. 7).

from the time of the last demand of payment before he could sell. The creditor could not buy the thing himself, except by a private arrangement with the debtor, or with the intervention of a magistrate. If a variety of different things had been pledged, the creditor might choose which he would sell, unless some one thing had been specially charged with the debt over and above a general hypothecation of the whole of the debtor's property, in which case that thing must be sold first.

On the sale being effected, the rights of the proprietor, that is the debtor, passed to the purchaser, and the surplus of the price after paying the debt was handed over to the debtor. The fact of the pledge did not prevent the debtor selling the thing himself at any time and paying the debt out of the proceeds of the sale. The creditor also could transfer to another all his rights in the thing pledged, including his rights of action against the debtor arising out of the pledge. Where the thing pledged was in the possession of the creditor, he could only use it in case of a special engagement (*pactum antichreseos*) being made, the effect of which was to enable the creditor to take the proceeds of the thing pledged by way of interest or to use it in lieu of interest.

(7) Dos.

The rights of the husband and the wife in the property conceded to the husband for the purposes of the marriage —either by the wife's father (*dos profectitia*) or by some other person (*dos adventitia*), and whether a special engagement had or had not been made to restore it (*dos receptitia* or *non*)—were limited rights of ownership in one and the same thing existing simultaneously and yet without conflict. The rights of the wife were such that, jointly with her husband, she was regarded as a true "possessor" of an estate,—her dower,—an advantage which in certain cases of litigation exempted her from the necessity of giving security. The wife, again, in recovering by action her dower, at the termination of the marriage, took precedence of all previous creditors under the supposition

L. 15, D. (ii. 8).

of a prior hypothecation. She could also sue for her dower in the event of her husband becoming insolvent, and had a right to have her funeral expenses defrayed out of it. L. 16, D. (xi. 7).

The husband's rights were, during the continuance of the marriage, those of an usufructuary. In Justinian's time the husband could neither sell nor charge the dower, nor remit a charge or servitude from which it benefited. In the case, however, of an estate having its value quantitatively assigned in the terms of the grant, the farm could be sold, inasmuch as it seemed that the value and not the specific estate constituted the dower. But an opinion prevailed that the sale could take place only if an option was left to the husband, and not if it was left to the wife only (*ut electio mulieris esset*).

According as the things comprised in the dowry were or were not quantitatively ascertained in the grant, the husband or the wife, and those to whom the dower was to be restored, incurred the risk due to losses and to casual diminution of value. Movable things the husband could freely part with, and he could manumit slaves, if included in the dower. Otherwise he was bound to take the same care of the property as an usufructuary, and was liable not only for fraud and positive fault (*culpa*) but for accidental loss, if caused by a want of the diligent attention which he bestowed on the care of his own private property. L. 17, D. (xxiii. 3).

On the termination of the marriage, the father of the wife recovered what he had given or contributed. What others had given went to the wife or her heirs, unless it had been agreed that it should be restored to the givers.

This subject will again be recurred to, at length, under the head of the wife's property in connection with family law generally.

(8) Peculium.

The concession of property (*peculium*) by the head of the family to his son or slave for private use or adventure

in trade, though fortified by custom, as a domestic practice, could not vest in the son or slave any legal rights of ownership as against the father or master. Nevertheless, the custom was not without some legal consequences, especially where the claims of third persons were concerned, with whom the son or slave transacted business on his own account. The force of the custom was, indeed, so strong that where a master and his slave had transactions with each other, a surety for the slave would be held legally bound, and he would be equally bound if the creditor were some outside person. So, again, if, after manumission, a master paid a debt arising out of transactions which had occurred during slavery, the master could not recover the sum back.

L. 64, D. (xii. 6).

In the case of creditors having a claim against a slave's or son's *peculium*, the slave's or son's debt to his master or father had first to be taken into account, and, if the slave had traded without his master's knowledge, or a son without his father's, it had to be paid in full. If the father or master had notice of the slave's or son's transactions, he could be made to share in the loss proportionately with the other creditors (*tributoria actio*). Where the dealings with the *peculium* brought advantage to the father or master—as in paying his creditors, or repairing his buildings—he was liable to satisfy debts arising out of the transactions to the amount of the advantage obtained (*actio de in rem verso*), even though they had been engaged in without his cognizance. If the transactions brought no advantage to the father or master, he was liable to make good any loss at least up to the amount of the *peculium* (*actio de peculio*) ; a debt due to himself in respect of the *peculium* being first, as above mentioned, paid in full.

D. (xiv. 4).

The position of the son in the power of a father or ancestor was greatly improved in respect of his capacity of ownership in consequence of a series of imperial constitutions reaching from the time of Augustus to that of Justinian. This improvement was wrought by means of a sort of fictitious extension of the older *peculium*. The result was that, in Justinian's time, a son in the power

L. 6, C. (vi. 60).

of a father or ancestor had the *dominium* of all property which came from his mother or from any other relative than the one in whose power he was, and of all property which he acquired by his own independent efforts, while the father or other ancestor had an usufructuary right in it for his life. In the case, however, of property being given by a father to his son on going to serve in the army, or of the son acquiring property while on military service, or while filling certain civil offices (*castrense* or *quasi-castrense peculium*), the son was legally regarded, for all purposes of using and dealing or parting with the property, as altogether independent of a father's or ancestor's control. The names *profectitium* and *adventitium*, borrowed from the analogous case of dower, have been given to the ordinary *peculium* (also called *paganum*, in opposition to *castrense*), according as it came from the head of the family or some other relative. This subject will be discussed again, in greater detail, in connection with the general topic of the family.

(9) Possession.

Possession, as meaning detention, which is legally recognized and protected, and not the mere fact of such detention, is a right of ownership, though very limited. By the operation of prescription, that is, the passing of a fixed interval of time together with the satisfaction of certain other conditions relating to the mode in which the possession began, possession might ripen into a right of ownership of the fullest sort.

A person was said to be in legal possession of a thing when he was, at the moment, conducting himself as if he had a full right of ownership in it. He must be physically detaining the thing, and he must furthermore be mentally resolved, if only for the moment, so to detain it for his own purposes (*animo et corpore possidere*). Physical detention need not imply actual or incessant contact. It was sufficient if it was symbolical, as by having the key of a cellar or stable, or could be reproduced at any

moment, or was effected by an agent. By a change in the mental resolution, a change in the personality of the possessor could be brought about without the thing changing hands.

There seem to have been three distinct origins for the protection which was accorded in Roman law to the person who was in possession. One origin for this protection was the fact that, up to the time of Justinian, when all distinctions between the plenary "Quiritarian" ownership and the mere possessory right of holding land *in bonis* were abolished, such mere possessory right, dependent on a paramount right of the State, was the only ownership in lands outside Italy possible to private persons. A second origin of the protection of possessory rights is to be found in the general policy of recognizing rights while being actually exercised, so as to prevent violence and extra-judicial conflicts during the interval while the judgment of a court of law is being waited for. Yet a third origin is to be found in the policy of satisfying natural expectations, of not disturbing long-established facts, and, through prescription, of providing that goods and land should not be long without an owner.

L. 1, C. (vii. 25).

Possession might be either such as would be sufficient to become, by prescription, when the proper time had elapsed, the fullest right of ownership (*possessio ad usucapionem*); or it might be only of the imperfect sort which was just sufficient to claim the interference of the prætor for its immediate protection (*possessio ad interdicta*). The former sort of possession required that it should have begun by some legally recognized mode (*justus titulus*), as, for instance, by gift, sale, or inheritance, which would have been legally sufficient to pass the rights purported to be conveyed but for some hidden flaw in the owner's title, but for some latent incapacity for transfer in the thing conveyed, or but for some defective execution of the transfer; and the possessor must furthermore have been at the time honestly unaware of the infirmity of his title (*bona fides*). An error in this last respect, however, due to gross negligence or ignorance of law, was not excused,

but was treated as incompatible with good faith. Where the fact of this sort of possession was established, the prætor awarded to the possessor not only protection in his possession till the true owner had established his claim, but also rights of action against trespassers analogous to the rights of action vested in a full proprietor (*publiciana actio*).

In estimating the continuity of possession for the sake of counting the time in cases of prescription, it was important to ascertain what was the intention of an actual possessor, and some arbitrary rules were laid down for determining who was the person on behalf of whom possession was intended to be held. Thus a person was regarded as in possession, for the purpose of acquiring a prescriptive right, if a slave or other person in his power were in possession without his cognizance, or other persons were, and professed to be, in possession on his behalf and with his cognizance. For the same purpose of prescription the possession of a mortgagee, a borrower, or a person holding the thing by a revocable licence (*precario*), is reckoned as the possession of him from whom the mortgage, loan, or licence, sprang.

Possession was sometimes distinguished as "just" and "unjust;" unjust possession being that which had been acquired and was held either surreptitiously, or by violence, or originally by leave and licence from the person against whom it was afterwards adversatively retained (*clam, vi, precario*). But no practical consequences followed from this division, and unjust possession was, equally with just possession, defended by interdicts. L. 3, § 5, D. (xli. 2).

A person whose possession had begun in a particular way, as by inheritance (*pro hærede*), could not, by his mere will, put himself into the position of a person whose possession had commenced in a different way. [*Nemo potest ipse mutare causam possessionis.*]

For purposes of prescription, however, and so far as good faith was concerned, the time which had elapsed in favour of a deceased possessor could be added to the time of possession by his heir. T. (ii. 12).

All legal possession, even though of a kind which could never ripen into a fuller ownership, was protected by a variety of appropriate interdicts, according as the possessor was menaced, or had been actually extruded. (*Interdicta, Uti possidetis,* "*Utrubi,*" "*Unde vi.*")

§ 3.—*Modes of Acquiring Rights of Ownership.*

The modes by which rights of ownership were acquired have been distributed in a variety of ways for the purpose of exhibiting them in a bifurcated arrangement, that is, divided into two classes. Such modes are according as an indefinite assemblage of rights, or only a single right, may spring from one act or event (*per universitatem* or *singularum rerum*), or, as the rights acquired owe their historical existence to the *jus civile* or to the *jus naturale,* that is, the *jus gentium;* or, as the rights acquired spring into existence for the first time, or are obtained by transfer, voluntary or involuntary, in life or on death, from a previous owner. But these are cross divisions, and it is more convenient to present at one view all the leading facts (acts or events) which were recognized by law as signs that rights of ownership had come into being, or had been transferred, without attempting a classification which rests only on historical considerations.

Thus the modes of acquiring rights of ownership may be arranged as:

(1) Occupation.
(2) Prescription.
(3) Tradition.
(4) Operation of law.
(5) Adjudication.
(6) Succession (on death), intestate and testamentary.

(1) Occupation.

Occupation includes every act of seizure of that which is at the time ownerless, by which one becomes an owner in the eye of the law. Thus, under this head are con-

tained the acquisition of new land or islands left by the altered course of a river, where the occupier had rights over that part of the river; the capture of wild animals or of tame animals, which by escaping and no longer being followed have recovered their condition of wildness; capture of an enemy's goods in war; gathering and reaping of fruits and crops; finding of things, the previous owner of which may be presumed to have abandoned them (*derelict*); the discovery of new and precious uses to which a thing in the accidental possession of the owner may be put, or the mixture with it of fresh things, or alteration of its substance (*specificatio*) in such a way as to change its use or largely to increase its value (*accessio, commixtio, confusio, adjunctio*). In some of these last cases the law obliged the new owner to compensate the previous owner of the substance wrought upon. J. (ii. 1).

(2) PRESCRIPTION.

In speaking of *possession* as a modified ownership, it was seen that one important species owed all its significance to the fact that, if it continued long enough, and certain conditions were fulfilled, it became converted into a full right of ownership. These conditions were a legal foundation for the original possession and good faith in the possessor, that is, absence of fraudulent or malicious intent (*justus titulus, bona fides*). According to the oldest Roman law, one year for movables and two years for immovables were the periods of time fixed for the ripening of possession into full ownership. By Justinian's legislation the periods of time were lengthened, the conditions were altered, or some of them dispensed with, and the operation of the principle was no longer confined, as before, to Italian territory. According to the law, as it was finally settled by Justinian's legislation, the following were the periods of prescription for different classes of things under the several conditions mentioned:

3 years for movables, *bona fides* and *justus titulus* indispensable.

10 years for immovables, *bona fides* and *justus titulus* indispensable.

20 years for immovables, under the same conditions, where the parties were "absent," that is, when the true owner had no opportunity of knowing his property was being continuously possessed by another. When he was present for part of the time, a proportionate number of years was deducted from the twenty years' period.

30 years for immovables where the true owner was unaware of his right, or for the following classes of things :—

Things belonging to the public treasury when the treasury has legally parted with them.

Things originally stolen or taken by violence.

Things belonging to minors, or to children inheriting through their parents' marriage, but which the father had illegally parted with.

Or where *bona fides* or *justus titulus* were absent, in the case of things for which otherwise a shorter period than thirty years would suffice.

40 years for all things not falling under any of the above classes, or which could not for other reasons pass in a shorter period.

Auth. Nov. cxi. Auth. Nov. ix.

Justinian, in his Novells, further extended the full benefit of the thirty years' prescription for ten years more,—that is for forty years,—to certain religious and charitable institutions, and to one hundred years for things of the Church.

The kinds of prescription which were completed in twenty years or less were called *Longi temporis præscriptio ;* the other kinds, completed only in a longer period, were called *Longissimi temporis præscriptio.*

For the purpose of completing the period of prescription, the times of possession of certain persons in privity with each other might be added together ; *e.g.* that of a deceased person and his heir, or one placed by the prætor in possession of the inheritance (*bonorum possessor*), or the buyer and seller.

It is, of course, presupposed, in acquisition by prescription, that the thing is susceptible of being appropriated. Thus, property in the State treasury cannot be appropriated by any lapse of time and possession. Nor other things in a similar category, as sacred things, and *res nullius* generally.

The term prescription seems to have taken the place of *usucapio*, as implying rather that the right of action on the part of the original owner was barred than that a new right was created. The term was a more flexible one to apply to the various new periods for acquiring those rights by possession which were introduced under the emperors. Pr. 1, C. (vii. 33). Gaius (ii. 59).

It might sometimes happen that a person, after formally alienating a thing, still remained in possession on trust from the new owner. In this case the shortest period of possession sufficed to transfer back again the ownership even of immovables (*usureceptio*). But if a special trust was created, by which a friend or creditor was to hold a thing either for its better safety or as security for debt, and yet the thing still remained in the owner's possession, in the case of the friend any way, and in that of the creditor on discharge of the debt, the owner of the thing was re-established in all his rights respecting it in the shortest of the possible prescription periods ; unless, indeed, the debtor hired the use of the thing, or enjoyed the use by special leave and license. "In this case," as Mr. Poste well translates it, "he reacquires without giving a consideration" (*lucrativa usucapio*). Poste's Gaius in loco.

When the time of prescription had run out, without the original owner having had a sufficient opportunity of interrupting the possession owing to his absence on State business, or on certain other accounts looked upon with indulgence, there was an action for re-establishing him in his rights (*rescissoria actio*). There was also a right of action conceded to one who had not yet completed his term of prescription against any one who, with a less good claim, infringed his rights, as by accidentally coming into actual temporary possession of the thing (*publiciana actio*).

It was fictitiously assumed that the prescription was already completed, and that, consequently, the possessor who had just lost possession was the original and true owner.

It is to be remarked that the possession necessary to found a prescriptive claim might be that of a third person in the name of his principal. If this agent was a free person (*libera persona*), the time only began to run from the principal's first knowledge of the fact of possession. If the agent was someone in the principal's power, the time began to run independently of the principal's knowledge (*statim vel ignorantes usucapiunt*).

(3) Tradition.

For the purpose of voluntary alienation, the old modes of conveyance by fictitious sale (with scales and seven witnesses, *mancipatio*) and confession of judgment (*in jure cessio*) had partly become obsolete, and had partly been formally abolished in Justinian's time. The only mode of formal alienation of rights of ownership was the actual or presumed passing of the substance of the thing by delivery from hand to hand (*traditio*). If the thing to be conveyed was already in the possession of the transferee, when the other conditions were fulfilled a mere signification of will sufficed to convert the possession into ownership. This has been called *traditio brevi manu*, in contrast to *traditio longâ manu*, which implied actual transfer.

C. 43, § 1, D. (xxiii. 3). L. 79, D. (xlvi. 3).

Tradition implied a mental intention in both the giver and receiver and a physical transfer either of the thing or of part of it, or of a material symbol of the thing as representing the whole. Not that generally mere tradition alone, however complete and regular, sufficed to pass rights of ownership. This was exemplified in the case of sale and gifts.

In the case of a *sale*, the sale as a contract binding on both parties is complete as soon as the price is agreed to by both parties, unless it belongs to the class which must be in writing, when the sale is not

L. 17, C. (iv. 21).

complete till this condition is fully complied with. But the right of ownership in the thing sold is not passed till the price is paid, or security given for the payment of it.

Gifts might either be purely voluntary, or be made in contemplation of death, or by reason of a subsisting marriage.

In the case of purely voluntary gifts, if they exceeded five hundred solidi * (amended from two hundred solidi under emperors before Justinian), the tradition was not legally complete and effective till it had been publicly registered (*insinuari actis intervenientibus*). A check was thus imposed on improvident donations, and in the case of ingratitude the transaction might be annulled. L. 35, § 5, C. (viii. 54).

Gifts in contemplation of the donor's death were null and void if death did not take place as apprehended, or if the receiver died first, or if the giver repented of his generosity. When they took effect they were treated in law in all respects as legacies.

Gifts made by reason of marriage were, in Justinian's time, named *propter nuptias*, thereby including gifts made by the husband other than dower before the marriage for the purpose of the marriage, and gifts made during the marriage for the purpose of increasing the dower.

(4) Operation of Law.

In a certain limited class of special cases acquisition took place by mere operation of law, that is, without any concurrent act of either of the parties or of a magistrate.

(*a*) In case of the adoption of one not already in anybody's power (*arrogatio*), of the property of the adopted so much only passed to the adopter as would belong to the natural parent if the adopted had been in his power. If the adopted person were under age, security had to be given to a public official that the adopter would restore all the property of the adopted to those who would have succeeded to it, had the adoption not taken place. 3 J. (i. 11).

* A *solidus* = an *aureus* = about £1 1s. See Smith's Antiq.

(*b*) By way of penalty for the defaults or misdoings of an owner. Thus, in case of fraud on the public treasury, the property in the thing fraudulently appropriated or dealt with passed to the treasury. So if a husband, on a second marriage, wrongfully appropriated or alienated property included in the dower given on his first marriage, that property passed to the children of the first marriage.

(*c*) If a co-proprietor of tenements refused to contribute his share towards the expense of necessary repairs, he forfeited his rights of ownership in favour of the proprietor who effected the repairs. But for the full accomplishment of the transfer, it would seem that a judicial proceeding, as that of a suit for partition (*de communi dividendo*), was required, and so this mode of acquisition would properly belong to the next head, of Adjudication. So if an owner deserted his land for two years, and another occupied and cultivated it and paid the State dues on it, he became the owner of it.

See Windscheid in loc.

L. 2, C. (xi. 58).

(*d*) In certain cases by way of security or of substitute for the performance of an obligation. Thus, a woman acquired the ownership of anything included in her dower which was wrongfully alienated by her husband; a pupil, in things purchased by his tutor out of the trust funds; a soldier, in things purchased with his money by some one else.

(5) Adjudication, or Judicial Sentence.

Besides the general cases of transfer by mere decision of disputed claims, rights of ownership passed as a direct and immediate consequence of a judicial sentence in the following special cases:—

(*a*) On an action for partition (*de communi dividendo*) or for making a family arrangement so as to carry a will into effect (*familiæ erciscundæ actio*), or for settling boundaries (*finium regundorum*).

(*b*) In the case of money borrowed on a pledge and not paid at the time promised, after all the legal periods of delays in favour of the debtor had elapsed, the proper notice given, the sale duly advertized, and—where the

security had not been originally imposed by a court of law —the requisite imperial license obtained, the property in the pledge passed at once to the creditor, subject to his making good to the debtor all losses by the transaction beyond the bare amount of the debt. C. (viii. 34).

(*c*) In the case of one owning a tenement in a condition dangerous to a neighbour and refusing to give security that he would make the proper repairs (*cautio damni infecti*). The prætor in this case conferred a possessory right on the neighbour or other person liable to be injured, and who in vain had sought for security. This right only ripened into ownership if the owner, after due notice and warning, continued to neglect the prætor's order to repair. At the prætor's discretion the possession was converted into full ownership.

§ 4.—*Modes of protecting rights of ownership.*

The subject of the modes of protecting rights belongs chiefly to the topic of procedure, under which it will be treated. But as the nature of the procedure resorted to often depends on the quality of the right, it is proper in this place to point out the classes of remedies provided for the protection of the main classes of rights of ownership. Arranged in order of efficacy, the remedies in use were :—

(1) Interdicts, or rather their later substitutes.

(2) "Real" actions for the recovery of the thing detained or for the actual enforcement of the right violated or menaced.

(3) "Personal" actions for compensation for detention of, or injury to, a thing.

(4) "Penal" actions for aggravated injuries to things owned by the person bringing the action as under the *lex Aquilia*, according to which damages to a slave or cattle were estimated at their highest value during the year. J. (iv. 3).

Of these remedies the interdicts were the most effective,

and seemed to have at last absorbed all the others, as will be explained in the chapter on Procedure. The division of actions into real (such as the *vindicatio*) and personal (such as the *condictio*), though dwelt upon in Justinian's Institutes as still theoretically applicable to the different cases of recovering a thing lost from the finder, of protecting a right of way against all the world, and of enforcing a contract against a particular person, had no practical consequences. The form of action became identical for all purposes, and the judge awarded the most appropriate remedy in his power.

CHAPTER III.

OBLIGATIONS.

§ 1.—*Nature and objects of obligations generally.*

AN obligation is, strictly speaking, a legal tie connecting two persons together in such a way that one of them is liable to perform towards the other a legal duty, which admits of being expressed in a monetary form, that is, in the shape, if not performed, of "liquidated damages." L. 9, § 2, D. (xl. 7).

The right answering to the liability has thus been called a *jus in personam*, or right against a particular and definite person, and is thereby opposed to a *jus in rem* (including rights of ownership, franchises, public dignities, and the like), in which the right, before it is infringed by any one, is exercisable not more against one person than another. The expression *jus ad rem* relates to that portion of the whole class of *jura in personam* which involve the acquisition of a right of ownership as the original basis of the obligation; as, for instance, the right which arises under a contract of sale. The right thereby accruing to have the thing effectually conveyed, and to have a good title made out, is a *jus ad rem* (*acquirendam*).

The term *obligation* itself suggests the analogy of a physical chain, and the analogy is followed out in all the affiliated terms. As Sir H. S. Maine says ("Ancient Law," chap. ix.), "The image of a *vinculum juris* colours and "pervades every part of the Roman law of contract and "delict. The law bound the parties together, and the

"*chain* could only be undone by the process called *solutio*, "an expression still figurative, to which our word payment "is only occasionally and incidentally equivalent. The "consistency with which the figurative image was allowed "to present itself explains an otherwise puzzling peculiarity "of Roman legal phraseology; the fact that 'obligation' "signifies rights as well as duties, the right, for example, "to have a debt paid as well as the duty of paying it. "The Romans kept, in fact, the entire picture of the legal "chain before their eyes, and regarded one end of it no "more and no less than the other."

In accordance with this view, an obligation arose not only out of a voluntary engagement or casual monetary relationship between two persons, but also out of the liability cast by a testator, or by operation of law, upon an heir to pay legacies; and out of such accidental injuries or offences as were held to impose the duty of making restitution or penal compensation, as well as out of a variety of other situations.

Before proceeding to consider the origins of obligations, it will be convenient to make some general remarks upon their objects, the parties to them, and the modes in which they could be extinguished.

The objects of obligations may be considered under the several heads of—

(1) What the object must be.

(2) Interpretation of the object.

(3) Discount and interest.

(4) Concurrence of obligations.

(5) Order of privileged creditors determined by the object.

(6) Impossible or illegal objects.

(1) What the Object must be.

Subject to the limitation that the object of an obligation must admit of being ultimately reduced to, and expressed in, a monetary form, it might be almost endlessly diverse in character. But there were some objects of obligations

which, in daily and in judicial experience, were so constantly recurrent that they gave occasion to the gradual formation of distinct groups of principles and rules, for the purpose of satisfying the reasonable expectations of parties interested, and of promoting the general ends of justice.

Thus the object of an obligation might be such as could not be precisely determined till later events, or the fulfilment of conditions, had reduced it to a certainty. To this class belonged such objects as involved choice as between one mode of performance and another, or dealings with things only generically described, or a dependence on the yet uncertain acts of a person to whom a binding promise has been given, or of any person other than the promisor himself.

The most familiar object of an obligation was the payment of a sum of money, either ascertained or to be ascertained. It was decided that such an obligation was not fulfilled for any purpose by the payment, even involuntary, of bad coin. L. 24, § 1, D. (xiii. 7).

A less definite but also very familiar object of an obligation was compensation for losses which might have been, or might hereafter be, incurred in the course of some transaction. The form of the liability incurred, in this case, was that of making good all that the other had staked in the transaction, and not only compensating him for actual losses but also satisfying his expectation of gain.

An instance of the class of obligations thus arising is supplied by the liabilities incurred under the *lex Aquilia*, by which certain injuries to another's property had to be compensated by damages amounting to the highest value the thing injured had attained during the current year.

(2) Interpretation.

The objects of obligations were either marked out precisely by the voluntary engagements of the parties to them, or judicially presumed from some situation or mutual relationship in which the parties found themselves; as, for example, where one happened to have paid to the

other money afterwards found not to be due, and claimed a presumed obligatory right to have it restored. Or the objects were strictly defined by positive law, as where the ground of obligation was the succeeding to an inheritance, the being appointed guardian, or the committing an offence (*delictum*).

But it might, and, in fact, very frequently must, happen that the terms of an agreement distinctly stated part of the object of an obligation, and yet it might subsequently appear from surrounding facts that there was another part which was intended, but not expressed. Or positive law might interpose to restrict the agreements of the parties, and by an arbitrary interpretation, as it were, force their will into certain predetermined directions.

In all these cases, except the last, as well as in all the numberless cases in which uncertainty proceeded from the necessary or accidental deficiencies of language, from the imperfection of memory, or from the ambiguities attaching to all formal ceremonial, a choice had to be made between treating all that was alleged to have taken place as nugatory, and imposing upon it some meaning or other. The latter course obviously recommended itself where part of what had taken place was unmistakable; and a reference had to be made—as in other cases of disputed interpretation—to the ordinary character and routine of such arrangements, to the habitual dealings of the parties, or to the general policy of the law and custom of the country.

(3) Discount and Interest.

The calculation of discount and interest, as an object of obligations, was partly a matter of private arrangement and partly of positive law, which came in either to supply the omissions of voluntary undertakings or to control their operation. Thus, where an appeal from a judgment seemed to be unreasonable, an obligation arose by which the loser of the appeal might be compelled to make good the difference between the value of the debt as put out at interest, between the time of the original judgment, and the judg-

ment on appeal. So if a legacy of a certain amount were payable on the performance of some condition at a remote time, its present value was to be calculated by deducting from the amount specified the accumulating interest for the intervening period before the condition was performed. L. 64, D. (xlii. 1). L. 66, § 1, D. (xxxv. 2).

The amount of legal interest varied considerably at different periods of Roman history. In the time of Justinian, the general legal rate was restricted to six per cent. a year; for the class of eminent State officials known as "illustres," to four per cent., and for merchants and bankers, to eight per cent. In the cases of advances on goods at sea—but only while actually out of harbour—unlimited interest had been allowed (*nauticum fœnus, trajectitia pecunia*), but Justinian restricted this interest in all cases to twelve per cent. Justinian's legislation vacillated on this subject in the later years of his reign, but he finally left the law in this state. Compound interest was not allowed, nor could a greater amount of accumulated interest be charged and recovered than equalled the principal. Paul ii. (14, 3). L. 26, § 1, C. (iv. 32). L. 26, § 1, C. (iv. 32).

This topic will be reverted to again later on.

(4) Concurrence of Obligations.

A number of really distinct obligations might either concur in time or coalesce, through an identity in their object, in such a way that it required fixed rules of law, or the exercise of judicial discretion, to distinguish and assign the rights and duties of the parties to them in their dealings with each other and with the outside public. Such obligations were those having one object, but more than one party (*correi*) on one side or the other. The usual rule was that payment by any one of the obliged parties put an end to the obligation. One person, however, might be only liable after a certain date or under certain conditions.

The case was different with an obligation to which, on one side, parties were added by way of sureties (*fidejussores*). If one of these were sued for the whole debt, for

which he was presumptively liable (*in solidum*), he could, in accordance with a well-known decision of Hadrian's, compel the creditor to exact a proportional share from each surety who was solvent at the time of commencing the action. If he and the person on whose behalf he undertook the suretyship neglected to do this, he was liable to pay the whole debt, without repayment from any quarter.

§ 4, J. (iii. 20).

(5) Order of Privileged Creditors as determined by the Object of Debt.

Where the same debtor had incurred a number of obligations and became insolvent, the character of the various obligations might determine the order in which the available assets were to be distributed. Thus, while creditors secured by a pledge or mortgage had precedence of all others, the following creditors, as being specially "privileged," had to be satisfied in the order in which they are here enumerated.

L. 9, C. (viii. 18). L. 74, D. (xxiii. 3). L. 22, § 9, C. (vi. 30).

(*a*) Creditors who had made advances towards their debtor's funeral expenses.

(*b*) The State and municipalities.

(*c*) The *fiscus* or public treasury, except for the purposes of obtaining payment of a fine or penalty.

L. 17, D. (xlix. 14).

(*d*) Creditors who had made advances towards building, equipping, or purchasing a ship.

L. 26, D. (xlii. 5).

(*e*) Creditors who had made similar advances towards repairing a house.

L. 24, D. (xlii. 5).

(*f*) Creditors of a public banker (*mensularius*) who had deposited money with him, not at interest.

L. 24, § 3, id. L. 24, D. (xlii. 5). L. 7, § 2, D. (xvi. 3). L. 8, D. (xvi. 3).

(*g*) A wife or betrothed in the matter of the promised dower.

(*h*) Creditors who had advanced money to satisfy privileged creditors.

L. 24, D. (xlii. 5).

(*i*) All persons bringing actions against guardians, and trustees in guardianship, and their deputies.

See Warnkœnig's Com. vol. ii. § 449.

(6) Impossible or Illegal Objects.

For various reasons the object of an obligation might be treated as impossible, in which case the obligation was, from the first, null and void. Thus, an agreement might be made to convey a specific thing, which did not exist, or which was not legally transferable or marketable; or for an immoral or illegal purpose, as gaming contracts (*alea*), to be alluded to lower down; or involving the performance of an impossible condition. In Justinian's time, however, a valid promise might be made the performance of which was to take place "the day before the promisor's death" or after his death.

13 J. (iii. 19), C. (iv. 11).

An instance of a class of objects specially rendered illegal on the ground of their presumed immorality is supplied by gaming contracts. These were forbidden in general terms by the prætor's edict, and the houses in which they were made placed under penal discipline. Money paid in pursuance of bets, especially with dice (*aleæ lusus*), could not be recovered back. The only exceptions were bets on certain athletic sports, as running, throwing the javelin, horse-racing and chariot-racing, and wrestling. These exceptions were introduced by a *senatus consultum*.

D. (xi. 3). C. (iii. 43), L. ult. C. (i. 4), Gaius (iii. 124).

A series of laws (*lex Titia, Publicia, Cornelia*) still further facilitated this class of gaming contracts, where "the subject of contention was valour" (*pro virtute certamen*), and allowed a formal engagement to be made (*sponsio*). The constitutions of the emperors maintained the same policy, Justinian especially forbidding the deacons, priests, and even bishops to play—a sort of game at wooden horse (*equi lignei*) presenting the chief temptation. Not only could such contracts not be sued upon, nor money paid be recovered back, but fine and penal servitude were imposed as penalties; ecclesiastical ministers being suspended and temporarily excommunicated for the first offence, and deprived of office as well as compelled to undertake the unpopular duties of a civic functionary in their native town or some other provincial town.

Justinian continued the old exceptions in favour of so-called "manly" sports; a limit, however, was imposed on the amount of the wager, the utmost permissible bet in the case of the richest class of the community being a *solidus* —about equal to an English sovereign.

Another instance of an illegal object invalidating an engagement on which an obligation purported to be founded, is that of a promise to marry (*sponsalia*). At one time, that is when, by the Julian law (B.C. 90), the privilege of Roman citizenship was largely extended throughout the towns of Italy, it seems that this contract (if formally made by questions and answers) could be sued upon, and the damages payable were judicially assessed with reference to the cause of breaking off the engagement and to the pecuniary prospects of the marriage. But the broad principle subsequently appears in the Digest, in the language of Paulus, that it tends to immorality (*inhonestum visum, non secundum bonos mores*) "to hold a marriage, existing or future, to be dependent on a penal bond." A plea of fraud could be set up against any attempt to enforce the bargain.

Aulus Gell. N.A. (iv. 4).

The difficulty was often got over by an interchange of material guarantees (*arrhæ*), a return of which could be sued for. In Justinian's time, the contract for a future marriage between persons, one of whom subsequently, but before marriage, determined to take up in preference a religious and celibate life, could be broken off by the recalcitrant party, if the man, by recovering back the pledge (*arrha*) he had given; and if it were the woman, by her losing the pledge given by the man to her or to her friends, without recovering her own. Under the previous law, the woman, if recalcitrant in these circumstances, had to pay double the value of the pledge committed to her. There was still inequality, though not so great as before.

L. 56, C. (i. 3).

Other instances of the illegality of the objects vitiating engagements are supplied by the Cornelian law, alluded to in a passage of Gaius, and by the *Senatus consultum Macedonianum*, rendering non-actionable the loans by money-

lenders to expectant heirs, and the *Senatus consultum Velleianum* forbidding women to become sureties. These two latter laws are treated lower down in connection with the general subject of parties to obligations. The Cornelian law forbade any one to bind himself as surety for another in one year to a greater amount than 20,000 sesterces. But there were certain excepted cases, as that of giving security for dower due, or for debts under a will, or generally under judicial order, or by legal permission. Gaius (iii. 124).

§ 2.—*Parties to obligations.*

The subject of parties to obligations belongs, in great measure, to other parts of this treatise, in which the general incapacities of all classes of persons are discussed, including the special rights and duties of guardians, trustees in guardianship, and agents under an express or implied contract of agency (*mandati, negotiorum gestorum*), as well as those of slaves or other persons representing those in whose power they are. But some more particular observations either specially belong to this place or, for the sake of clearness and completeness, must be reiterated or anticipated here.

The incidents of (*a*) age, (*b*) sex, (*c*) physical or mental infirmity, (*d*) marriage, and (*e*) insolvency might all affect the capacity of a person to become the subject of an obligation, —that is to acquire the rights and incur the duties involved by it—as well as to fulfil an obligation undertaken or cast upon him either by law or by the events of life and the acts of others.

Thus, as to (*a*) age, (*b*) sex, and (*c*) physical infirmity, one under the age of puberty (that is, fourteen years) could only acquire for himself, and independently of his guardian, such an obligatory relationship as, on the whole, was beneficial to him. He might do such acts as would make his position better, but not worse. The same disability extended, on occasions approved by the magistrates, to a

minor under twenty-five years ; to women of a marriageable age ; to insane persons, and prodigals proved to be wasting their hereditary estate ; to the deaf and dumb, and persons permanently incapacitated from attending to their own affairs. Furthermore, the institution of the son's *peculium* introduced certain special obligatory disqualifications to be treated under that head.

There were two special legislative acts by which the capacity of sons in their father's power, and of women, were severally restricted. One was known as the *Senatus consultum Macedonianum*, which invalidated all engagements for monetary advances to sons in their father's power by refusing to creditors all right of action, even when afterwards the son was liberated from the parental control. The other was known as the *Senatus consultum Velleianum*, which similarly invalidated all engagements made by women, in any form, for the purpose of becoming surety for others. If, however, they made a payment in pursuance of such an engagement, they could not recover it back.

D. (xiv. 6). C. (iv. 28).

D. (xvi. 1). C. (iv. 29).

The condition of (*d*) marriage, even after the old subjection of the wife to her husband's control or *manus* was abolished, introduced the special disqualifications in respect of obligatory rights and duties involved in the institutions of the *dos*, the *paraphernalia*, and gifts to the wife after marriage, the account of which belongs to the subject of marriage generally. The general rule in such cases was that though the property was vested in the wife, the husband administered it in her name, and could make all the engagements necessary for that purpose, including the enfranchisement of slaves included in the dotal estate, the bringing of proprietary or quasi-proprietary actions, and bringing and defending actions on delicts in respect of injuries to dotal property, or for which the dotal proprietor is responsible.

Even with the wife's consent, however, the husband could not, under Justinian's legislation, alienate, or in any way hypothecate, charge, or burden, the dotal estate. The

wife, on the contrary, in the event of her husband seeming likely to become insolvent, might herself interpose to take precautions that her dotal estate was not wasted, nor herself and children deprived of the benefit of sustenance from it. Thus, when once there was good reason to believe her husband's means were getting so far reduced as to be unable to make good his liabilities, by an action for a restitution of the dotal estate the wife might exact security, or even temporary sequestration of the dotal property, in expectation of better times, or of her husband's death. According to the latest legislation of Justinian, she could recover the dotal estate in kind for all purposes as effectually as on the termination of the marriage. A limitation was, however, imposed, to the effect that the recovered estate must be employed for the current subsistence and needs of the wife and children. In the above way a wife might become a party to various sorts of obligation in respect of the dotal estate.

15, C. (v. 15).

L. 22, D. (xxiv. 3). L. 29, C. (v. 12). Nov. (97, c. 6).

In case of (*e*) insolvency, or of apprehended insolvency under Justinian's legislation, a trustee was appointed to enter into possession and sell the debtor's property for the benefit of his creditor, the residue (if any) being handed back to the debtor. This trustee (*curator distrahendorum bonorum*) became a party to all the obligations which these transactions successively involved. In the same way every person placed by the Prætor's interdict in possession of property, with charges and liabilities attaching to it, might have to discharge the various sorts of obligations thereby involved. Thus, when the Prætor accorded the rights of an heir, under the name of *bonorum possessionem*, to one whom he regarded as having a natural, moral, or equitable, as opposed to a strictly legal, claim, the grantee in possession lay under all the liabilities with respect to the payment of legacies and execution of trusts indicated by the deceased in the terms of a will valid for such purposes, or in a codicil to such a will, or in a codicil without any will at all.

L. 9, D. (xxvii. 10), I J. (iii. 12).

Apart from, or side by side with, the consideration of the classes of facts just enumerated as incidentally affecting the character and capacities of parties to obligations, the law itself provided different orders of specially qualified representative persons to act in the name or on the behalf of the original parties to an obligation, or gave its special sanction to a nomination (actual or presumed) of such representatives made by the parties themselves. Such representatives may thus be arranged under the two heads of :—

(1) Officially Authorized Representatives.

(2) Privately Authorized Representative.

1. To the former class belong :—

(*a*) Heirs testamentary and on an intestacy ; persons (whether creditors or not) placed in the position of an heir on condition of liberating slaves, and satisfying, as far as possible, the other claims or inheritance ; and trustees of insolvents, whether directly nominated by a magistrate for the purpose of at once selling the assets and satisfying all claims (*curator bonorum distrahendorum*) or creditors put in possession (*bonorum cessio*) by an imperial license, as an alternative to the condition of allowing the debtor a delay of five years with the hope of thereby obtaining payment in full (*quinquennales induciæ*).

J. (iii. 12). L. 15, C. (vii. 2).

L. 8, C. (vii. 71), D. (xlii. 3, 5).

A special constitution of Justinian's for the first time allowed the creation of obligations of all sorts which provided that the fulfilment of them, either in respect to rights or to duties, was to begin with the heir. It was the same emperor who, while recognizing the general principle that the heir presumably inherited all the obligatory rights and duties of the deceased, enabled him to protect himself against personal liabilities not covered by the value of the estate. This he could do by making within three months or a year, according to the situation of the property, a duly authenticated statement (*inventarium*) of the assets of the deceased, and paying the creditors in the order in which they presented

13 J. (iii. 19). C. (iv. 11).

L. 22, C. (vi. 20).

themselves. If the legatees were paid at the expense of creditors, the latter might recover against the former ; but the heirs were exempt from all liability. Generally speaking, obligations arising out of offences or delicts were available in favour of the plaintiff's heir, with the exception of the somewhat peculiar one arising out of personal injuries (*actio injuriarum*), such as libels and disgraceful assaults, for which the penalty was fixed partly by the plaintiff and partly by the judge. But they were not available against the heir of the defendant. Even in the case of an obligation arising out of a contract where fraud was imputed, the obligation could only be turned to account against a defendant's heir in case proceeds of the fraud had come into his hands.

J. (iv. 4).

J. (iv. 12).

(*b*) Guardians and trustees in guardianship (*tutores curatores*) were, in fact, public officials, a main part of whose duties was, as will appear in a later chapter, the becoming parties to obligations to which the original and principal—though in some way incapacitated—parties were the young, the infirm, or the insane.

(*c*) All public bodies or corporations had special officials bearing various titles, who assumed the obligations which befel corporations, enforcing rights, performing duties, making payments, giving receipts, bringing, defending, or settling by arrangement, actions at law.

Thus, while it was the essential right of a corporation to have either a *syndicus* or an *actor*, the latter might be appointed only for a special transaction. He was usually a slave, and he might be required, on behalf of the body he represented, to accept a legacy, or to exact a security for the prevention of threatened injury (*damni infecti*), or for the payment of a judgment debt. In such cases the money was payable not to the *actor*, but to the general manager (*administrator*) of the affairs of the community, who also had the right to settle matters in course of litigation. The *actor* must be appointed in a legal way and with the proper formalities. It

L. 10, D. (iii. 4). L. 12, C. (ii. 4).

was not enough that one purporting to be an *actor* did, in fact, represent a majority of the individual members of the corporation. It was said that "he interposed not on behalf of individual persons, but of the corporation or township as a whole."

L. 2, 3, D. (iii. 4).

2. To the class of privately authorized representatives belong those authorized (*a*) *expressly*, such as persons acting under a contract of mandate, paid agents, persons called to act on behalf of those in whose power they were when acting under explicit directions; and (*b*) *implicitly*, such as persons in another's power yet not acting under his explicit directions, either through dealings with the property of their father or master, or through the acquisition of the benefits of the obligations by the use of their own time and labour, invest him with advantageous rights of which he is as fully able to avail himself as if he had procured them by his own unassisted efforts. These rights are enforced by the several actions described in connection with the account of slaves' *peculium*, and known as *quod jussu*, *de peculio*, *de in rem verso*. By a like implied agency the husband represented husband and wife in managing the dotal estate, and partners represented one another.

The express representative character, imparted by a mandate—which could not be undertaken for a pecuniary consideration, though the agent might derive other kinds of advantages from his intervention—extended either to some single matter or to all the concerns of the principal (*procurator omnium bonorum*). The single transaction might be the bringing or defending of an action in the principal's enforced absence, or the mere formal completion of contracts, or the collection of debts, or the exaction, by use of the proper forms, of the different sorts of security.

The liabilities to which a person exposed himself by interfering with the affairs of another, as well as the rights to which his interference, if *bonâ fide*, might entitle him, belong to the class of obligations into which one of the parties, at least, enters in an impliedly and, as it were

accidentally, representative character (*actio negotiorum gestorum*).

Similarly, a person incurred obligatory liabilities through injuries of certain special kinds committed by persons in his power, resident on his premises, or in his temporary or permanent employ. Such injuries are comprised in the list of *quasi-delicts*, the essence of most of which was that the owner of the premises, house, room, ship, tavern, or hostelry, through the medium of which the injury was wrought, was in no way personally and morally accountable for the injuries committed, and indeed was probably ignorant of the fact of their commission; while his sons living with him, his slaves or free persons in his permanent or temporary employ, involved him, by their careless acts or omission, in the necessity of giving compensation to innocent and injured strangers, and so made him party to an obligation he could in no way have foreseen.

§ 3.—*Extinction of obligations.*

An obligation, as existing between two parties, was extinguished by any mode which either terminated every legal relationship which bound them together or which substituted a new legal relationship for the existing one. The mere addition of a supplementary obligation, as by adding a new party (*adstipulatio*), was no extinction; but the taking up or absorption of an old obligation into a new and more comprehensive one,—as where, owing to insolvency, or death, or the institution of a trustee in guardianship, or lunacy (*curatela*), a single debt was treated as part of an aggregate whole or *universitas juris*,—is such an extinction.

The modes of extinction of obligations may be classed as falling under one or other of the following heads:—

(1) Fulfilment (*solutio*).

(2) Release (*acceptilatio*).

(3) Set-off and mutual adjustment of accounts (*compensatio*).

(4) Renewal (*novatio*).
(5) Amicable adjustment of litigated claims (*transactio*).
(6) Reference to an arbitration (*compromissum*).
(7) Transfer (*cessio nominum*).
(8) Bankruptcy (*cessio bonorum, curatela*).
(9) Merger (*confusio*).
(10) Judicial process or decree, oath, and prescription.

(1) Fulfilment (*solutio*).

The natural and normal mode of extinguishing an obligation is by precisely satisfying all the rights, and performing all the duties, which it strictly comprises. Where the obligation is an alternative one, an actual choice has to be made between two or more objects or modes of fulfilment. Where things are only generically described, they have to be specifically or individually selected, as, for instance, "a bushel of corn" generally has to be reduced to the definite shape of a particular bushel, or "a quarter in value of the wine in my cellar" to be converted into a numerically estimated quantity of bottles described as belonging to different vintages or as bearing various brands and stamps. Where, again, suspensive conditions may be interposed, interest may have to be calculated and added to the debt, or discount to be subtracted by reason of premature payment, or deductions to be made for counter expenses, for advances, or in respect of losses through the delay or negligence of the person in favour of whom the obligation is to be performed. The obligation is only fulfilled when all the acts of this kind are done, the calculations and adjustments made, the conditions satisfied and the residuary payments accomplished, which the express or presumed agreement of the parties contemplated; or which ordinary custom, as applicable to that particular class of transactions and sanctioned by law, imports into their agreement; or which, as in the case of the penal damages for injurious offences committed more or less intentionally (*delicta* and *quasi-delicta*), positive law peremptorily announces to be the sole necessary and sufficient mode of fulfilling the obliga-

tion. It made no difference to the validity of the fulfilment who it was who discharged the obligation, or whether the debtor consented to his own liberation or was even aware of it. J. (iii. 29).

If the payment were refused by the creditors, the offer of payment and deposit of the money in a public place, as a church, if so required, or with a magistrate, was equivalent to payment. L. 19, C. (v. 32). Where a debtor paid his creditor a sum in bulk, in respect of a variety of debts, he might indicate to which debt the payments were to be first appropriated. If he intimated no preference himself, the creditor was bound to consult his debtor's interests by regarding the most burdensome debts as discharged in order, such as, first, those carrying interest; then debts accompanied by securities; then those for which the debtor has already incurred an adverse judgment; then those for which he would be in danger of encountering a sentence which would import infamy or invoke criminal punishment; and if no other ground of precedence existed, the older must be held satisfied before the later. L. 97, D. (xlvi. 3).

Where the proof of satisfaction by payment is a document proceeding from the creditor, it cannot be pleaded in an action for thirty days after date. L. 14, § 2, C. (iv. 30). Proof of satisfying by payment an obligation based on a written agreement could only be supplied by the evidence of five witnesses of good character, who could swear they personally witnessed the payment. L. 18, C. (iv. 20). The payment of a debt instantly liberated all sureties and discharged all securities for its payment.

(2) RELEASE (*acceptilatio*).

An obligation could be extinguished by release, on the part of the person in whose favour it was to be performed. This release might either be the expression of a fresh agreement between the parties, or it might be entirely one-sided and proceed from the unrecompensed liberality of one of them. It might be effected either by reversing

the process by which the obligation came into being, or by making an entirely new agreement, having for its object the release of a debtor under an old one. In the case of an obligation resulting from entries in the household accounts (*litteris contracta*), a mere entry of the fact of the debt being satisfied was sufficient; when formal words had been used, as in the contract by question and answer, the inverse words could any time effect a release. In these cases it is presupposed that the relations of the parties have either not been altered or not immediately altered by anything done under the original agreement. Where the duties under an agreement had been partly executed, or it was desired to release a debtor from a number of obligations of different kinds, a proceeding was used by which, first of all, the duties of every kind yet to be performed by the debtor were gathered up into an uncomplicated statement of net money due on an account stated under a newly substituted agreement; release from this last obligation was granted by an agreement of question and answer. The former of these agreements was named the *Aquiliana stipulatio*, and was invented by a jurist, Gallus Aquilius, a contemporary of Cicero's.

1, 2 J. (iii. 29). L. 17, D. (xxxix. 5). L. 2, C. (viii. 44).

(3) Set-off and Mutual Adjustment of Accounts (*Compensatio*).

Where there were mutual accounts between two persons, a sum owing on one side could be "set-off" against an equal sum owing on the other side and, to the extent that this was done, the obligations, which included the debts on both sides, were extinguished. The debts, for this purpose, must be at the time reduced or easily reducible to a simple money value, and the intention to set-off one debt against another debt, or part of another debt, must be clearly and positively manifested, each debtor having the right of selecting which of his liabilities he would wish to have cancelled. Provided the debts were fully due and could be sued for at once, it made no difference how they had

arisen; in what kind of action they might have to be sued for; whether they could be sued for directly, or whether they could only be made available by way of plea, or by way of the equitable cognizance of a judge bound to give effect to considerations of good faith. At one time it would seem that a set-off was only enforceable in the case of a banker (*argentarius*), who could only sue for the residuary difference between his claim on the defendant and the defendant's claims on himself, and of the purchaser of an insolvent's estate (*bonorum emptor*). In the banker's case, however, only debts of the same kind could be set-off against each; in the case of the purchaser of the estate, debts could be set-off which had not yet been reduced to a common money measure, as things owing in *specie* against money.

Gaius iv. C. 4, 66. J. (iv. 39). D. (xvi. 2), C. (v. 31).

(4) Renewal (*Novatio*).

An obligation was extinguished when a new one was substituted for it, as by altering one of the parties or the time of payment, or by introducing a new condition. When a new surety was added, there was, strictly speaking, only a supplementary obligation entered into over and above the old one, which still subsisted in full force,[1] though Justinian in his Institutes calls this addition of an obligation by the same name as the substitution of a new one (*novatio*).[2] Justinian enacted that the intention to enter into a substituted obligation must be clearly and distinctly manifested, otherwise the old obligation will continue to subsist in full force.

[1] L. 8, C. (viii. 42).

[2] 3 J. (iii. 29).

In former times, even up to the days of Gaius, when the contracts made by mere entries into the household accounts were in full force, a renewal (*novatio*) of an obligation was said to be effected either by changing the parties or by altering the ground of a debt, as by debiting a sum due on a sale or hiring as a loan. The debts so entered were styled *transcriptitia nomina*. As the creation of them was connected with customs peculiar to Roman citizens, the debts expressing this kind of obligation were sometimes opposed

to *nomina arcaria*, resulting from the actual passing of money, and mostly in use among foreigners. The renewal signified in *transcriptitia nomina* was pre-eminently and, no doubt, permanently in use among bankers.

Gaius (iii. 181).

(5) Amicable Adjustment of Litigated Claims (*Transactio*).

An obligation was extinguished when the parties to it, believing that some disputable questions it involved were incapable of being settled in a way completely satisfactory to both of them, and that a suit, either actually pending or in contemplation, could only have a result injurious to one or both of them, or would be of interminable duration, made an agreement by which each party consented to forego part of his claims in order to close the matter finally. This sort of settlement (*transactio*) supposes that each party incurs some loss, otherwise the arrangement rather belongs to the class of donations. The usual mode of effecting the arrangement was by a simple agreement (stipulation by question and answer), or by such an agreement, accompanied by mutual promises to pay a penalty, if the original obligation were in any way kept in force or sued upon.

D. (ii. 15), C. (ii. 4).

(6) Reference to Arbitration (*Receptio arbitri, compromissum*).

According to the Prætor's edict, it was always open to the parties to an obligation to refer a dispute in reference to it to one or more arbitrators, instead of waiting for the decision of a court of justice. In earlier times an award was only available by way of plea, but Justinian specially enacted that if the parties agreed in writing to refer a matter, or after an award swore to abide by it, an action would lie on the award. In any case, silent acquiescence in an award for ten days made it binding on the party accepting it.

D. (iv. 8). C. (ii. 56).

The whole proceedings, as well as the arbitrator himself, were under the control of the Prætor or district magistrate, who, if two arbitrators were chosen and they differed, would oblige them to choose a third. Some few matters could not be referred, such as matters affecting liberty or civil condition, and those in which the State had a direct concern, as in all proceedings of a criminal nature (*publica judicia*). Though the parties could determine by arrangement the precise points to be referred and the formal regulation of the proceedings, they could not restrict the full liberty of discretion and of equitable appreciation to be left to the arbitrator. An arbitrator must be at least twenty years of age.

(7) TRANSFER (*Cessio nominum*).

It was a general principle that obligations could not be transferred by voluntary alienation. An equivalent effect might, however, be brought about, and the obligation, as existing between the two original parties, extinguished by passing over to another the right of action. This might be brought about either voluntarily or by compulsion: voluntarily, in pursuance of a sale or of free gift, as by way of dower; compulsorily, as where one has managed the business of another, and is bound to pass over to his principal the rights of action thence accruing, making the principal thereby, as it was said, an "authorized agent for his own affairs" (*procurator in rem suam*); or in the case of a guardian who has to pass over his rights of action to his ward on the termination of the guardianship, or in that of an heir who has, by the terms of the will, to pass his rights of action over to a legatee. The Anastasian constitution prevented a transferee of a right of action on a voluntary sale claiming more from the defendant than the amount of the purchase-money, except on sales between co-heirs, or resulting from family settlements, or in case of debts, which he, who is at once the creditor and vendor, holds by way of security.

L. 10, § 6, D. (xvii. 1).

§ 2, 1 J. (ii. 20), 22, C. (iv. 35).

It was a fixed rule that whereas no assent to a transfer

of the right of action was required from the debtor, yet nothing must be done to put him in a worse position than he was before. Thus, whatever special pleas on the ground of fraud, or whatever rights to delay, or to set-off, he had against the original creditor, he could use against the transferee in addition to any pleas or rights which might be personally available only against the latter. On the other hand, while the transferee could use all the rights inherent in the nature and circumstances of the debt, he could use none which, by way of accidental privilege, were inherent in the person of the original creditor. On similar grounds a transfer could not be made to a person who would or might enjoy a more favourable position than the original creditor for bringing pressure to bear on the debtor, as to professional advocates, the emperor, or the imperial treasury.

L. 9, § 2, D. (i. 16), C. (ii. 13, 18).

Certain classes of obligations could in no case be transferred, as those where the personality of the creditor largely entered into the obligation and affected its quality. To this class belong the obligations of partners and those concerned with the supply of daily support or aliment. So the accessory rights of creditors, as those arising from personal security or a pledge, could only be transferred along with the rights to the principal debt. So likewise actions which have already began could not be transferred. If the transferee knew of the pending action he was fined the whole price paid, which was confiscated to the public treasury. If he was ignorant, he recovered the price, if already paid, and also was entitled to receive from the would-be vendor a third part of the proceeds of the action. But the transfer of rights of action arising out of dealings with dotal and hereditary estates was excepted from this rule.

L. 2-4, C. (viii. 37).

(8) Bankruptcy (*Cessio bonorum, curatela*).

From very early days in the history of Rome, certain extra-judicial modes of securing the interest of creditors in the event of their debtor's insolvency were a marked peculiarity of Roman law. The earliest remedy in the

hands of creditors seems to have been that supplied by the spontaneously developed tie arising out of a fictitious sale, by which a borrower sold himself and all his belongings to the lender, conditionally on the debt not being repaid at the proper date. The debtor was said to be *nexus*, and the transaction was the species of *mancipatio*, which was called *nexus* or *nexum*. It would seem from a well-known passage of the XII. Tables, from an antiquarian dissertation in the "Noctes Atticæ" of Aulus Gellius, and from a variety of indisputable events of great historical importance, that the defaulting borrower in the case of such an engagement became his creditor's bondman, if not strictly slave, and was customarily confined as a prisoner on the creditor's premises, always supposing that the debtor's estate and goods were insufficient to meet the debt.

Aul. Gell. xx. 1. See Mayntz in loc.

In default of the special security by way of *nexum*, which operated independently of judicial intervention, a creditor had been obliged to have recourse to the magistrate who, after judgment at law, would first grant a delay of thirty days, and then assign over (*addicere*) the debtor to the creditor, in such a way that if he failed to satisfy the debt in sixty days he became as much in the creditor's power as if he had originally been bound by way of *nexum*. The ulterior proceedings seem, if they were ever resorted to, to have been of a severe and indeed barbarous kind.

The *lex Pœtelia Papiria*, B.C. 326, abolished the institution of the *nexum*, liberated all debtors at the time in confinement under it, and modified the severities enforceable on an *addictio* or judgment against the person.

Between the date of this law and the Christian era, the remedy, of which the State had from time immemorial availed itself for the satisfaction of debts to itself out of the debtor's estate by peremptory sale (*sectio bonorum*), was extended by a prætor, Publius Rutilius, to the case of a private debtor who fled or hid himself from his creditors, or who voluntarily, in order to protect his person from arrest, submitted his estate to the process of judicial sale.

Gaius iv. 35.

Nevertheless, in all cases, the public sale of a debtor's estate, either in his lifetime or on his death (*proscriptio et venditio bonorum*), included him in the class of "infamous," and, if living, of "suspected" persons. Such a result was consequently much shunned, and various devices were resorted to, especially at death, to obviate it.

Gaius (ii. 1,54), Id. (iii. 78). Id. (iv. 102).

The *lex Julia*, of the time of Julius or Augustus Cæsar, introduced the voluntary surrender (*cessio bonorum*) of a debtor's estate for the satisfaction of his creditors, so as to avoid, in some cases, the infamous circumstances of a public sale, as conducted under the older law. On making the surrender, either a private composition was made with the creditors or a sale took place. In this last case the operation was extended over two stages, and was the same in form as the forced sale under the Rutilian law. For thirty or fifteen days, according as the defaulting debtor was alive or dead, the creditors were merely put, by force of a magistrate's order, in provisional possession, the fact being publicly advertized. On the magistrates being satisfied that none of the debtor's friends would come to his rescue, a fresh order was made, and the possession of the creditors was confirmed for the purpose of proceeding with the sale and the satisfaction of debts. This was effected by the medium of a liquidator (*magister*), chosen by the creditor, who, after a fresh delay of thirty or fifteen days, as the case might be, was empowered by a final order to sell the estate on condition that the buyer should distribute the proceeds, as far as they would go, at a fixed rate per cent. among the several creditors, as arranged by themselves. The purchaser acquired from the magistrate a possessory title, and had the requisite possessory remedies.

Gaius (iii. 78, 79), D. (xlii. 3), C. (vii. 71).

Thus, the purchaser was the debtor's "universal successor," and, according as the debtor was alive or dead, the purchaser could avail himself, for the purpose of following up the property, of the remedies of the "Rutilian" or the "Servian" action. He had, of course, cast upon him the duty of paying the creditors according to the tariff which

entered into the conditions of sale. In the meantime the debtor was liberated from all further liability, except as respects subsequent earnings or acquisitions, out of which he was held liable to make fresh payments up to the point of leaving himself a moderate competency (*in quantum facere potest*), which was to be judicially estimated without a fresh sale. Where the proceeds of the debtor's estate were insufficient to cover the whole of the debts, the only advantage he obtained from the voluntary surrender was the protection of his person. Where a public sale could be dispensed with by private arrangement, the debtor was saved from "infamy."

L. 4, 6, D. (xlii. 3).

L. 1, C. (vii. 71).

This procedure was at once tardy, complicated, and severe. Two alternative methods of settlement with an insolvent's creditors existed in Justinian's time, though without involving an entire disuse, or at least express abolition, of the various older remedies of compulsory sale and universal assignment. The new methods point not only to a more liberal appreciation of the purely trade relations of debtor and creditor, but also to the modification—conspicuous in so many other fields—of the root conceptions of the older Roman law, such as that of universal succession.

J. (iii. 12).

One of these methods was what may be called "sequestration" to an assignee in favour of creditors (*curatela bonorum distrahendorum gratiâ*). It had originally been introduced for the benefit of debtors of the rank of senators and persons enjoying certain recognized social distinctions (*clari*). By Justinian's time it was extended to debtors of all classes. An assignee (*curator*) was chosen by concert between the insolvent and his debtors. He had the charge of all the insolvent's property, in trust to sell so much of it as was required to pay the whole of the debts on the proportion agreed upon, and to hand the residue over to the debtor. No universal succession took place, and while the debtor acquired no protection in respect of debts or of assets not specially included in the arrangement, the fact of the sale brought

L. 5, D. (xxvii. 10).

with it no infamy. The general duties, liabilities, and rights of the assignee were the same as those of the manager of the estates of minors and the insane.

The other method, that by granting a delay not exceeding five years (*quinquennales induciæ*), was still more beneficial to the debtor in cases in which it could be resorted to at all. The creditors were, on a special application by the debtor to the emperor, required to choose by a vote of their body, taken under the supervision of a magistrate, whether they would proceed at once to a surrender and sale of the debtor's estate, taking their chance as to how far the available assets would go, or whether, as an alternative, they would give their debtor a period not exceeding five years, during which his estate and person would be protected, and after which he might be expected to be able to pay his debts in full. For the purpose of voting, the creditors were estimated, first, according to the value of their debts; and then, if the debts were of equal value, according to the number of the creditors; and, if there were an equal number of votes for and against delay, the presiding magistrate was required to adopt the "more humane" course of granting delay.

L. 2, 3, 4, C. (i. 19). L. 8, C. (vii. 71).

In the case of all these classes of proceedings, the conduct of the debtor, as affecting their validity in his favour, was required to be *bonâ fide* and free from just imputations of misappropriation or of fraudulent preference before or during bankruptcy. The mere statement of his property by an indebted person, was not *ipso facto* invalidated apart from positive proof of fraudulent intention; but the proved knowledge by a debtor of the extent of his own indebtedness at the time of dealing with his property for his own use, irrespective of his creditors, might supply such positive proof in the shape of an irresistible presumption of fraudulent intention. In such a case the property might be followed and claimed by the creditors or their representative, into whosoever hands it had come (*Pauliana actio, interdictum fraudatorium*).

L. 1, § 2, D. (xlii. 8).

L. 17, § 1, D. (xlii. 8).

L. 38, § 4, D. (xxii. 1).

The order in which creditors regarded as "privileged" had to be paid has already been described in connection with the possible collision in the objects of several co-existing obligations (p. 174).

(9) Merger (*Confusio*).

An obligation could be extinguished by the two parties becoming, through the happening of ulterior events and the operation of law, one and the same. This took place, for instance, when, on an intestate or testamentary succession, a creditor became his debtor's heir or a debtor his creditor's. So when, in consequence of a sale of an intestate or insolvent estate, a creditor became his own debtor, or when a debtor and creditor entered into an universal partnership (*societas omnium bonorum*) in which there could no longer be distinct and opposed interests. Where, in case of suretyship, the creditor stepped by succession into the place of the principal debtor, the whole obligation, together with its attending securities, were extinguished; but where the creditor only succeeded to the place of a surety, the principal obligation remained unaffected, the subsidiary obligation of suretyship alone being extinguished.

L. 75, D. (xlvi. 3).

L. 21, § 3, D. (xlvi. 1).

Obligations were similarly extinguished by merger when, in the case of joint promisees or promisors (*correi*), one became heir to one of the rest, or one made all or some of the rest his heirs. In such cases the number of correal obligations was accordingly reduced.

L. 93, § 2, D. (xlvi. 3).

(10) Judicial Process, Oath, Prescription.

So soon as an obligation had become a matter of litigation, and a decision was pronounced in favour of supporting it, all ulterior proceedings must take place on this decision (*res judicata*), and the nature and circumstances of the original obligation were henceforward left out of account. There is reason to believe, however, that if the judgment were after-

See references, Mayntz, § 382.

wards successfully impugned, a "natural" obligation was regarded as still subsisting, which, as will be explained shortly, was valid and valuable for many purposes.

A parallel mode of extinguishing obligations was by the oath tendered before, or in course of, litigation by one party to the other. If the oath were accepted and taken the fact in litigation was henceforward no longer the existence of the obligation, but the question whether the oath had been taken or not. The taking of the oath was regarded as an efficient discharge (*acceptilatio*), and it liberated all the subsidiary securities.

§ 11, J. (ii. 6). L. 40, D. (xii. 2).

It has sometimes been doubted whether prescription which barred an action, also so far extinguished the obligation as to prevent even a natural obligation taking its place.

But inasmuch as the whole purpose of the institution of prescription related to litigious rights and procedure, and, furthermore, Justinian extended the time of prescription for subsidiary obligations given as securities eighteen years beyond the time for the principal obligation, there can be no doubt that a natural obligation survived.

L. 7, C. (vii. 39).

§ 4.—*Classification of Obligations according to their Origin.*

It being borne in mind that an obligation, strictly speaking, meant nothing more than a duty and a corresponding right existing between two persons individually determined, the modes in which such a relationship might be created were almost co-extensive with the whole field of law. The most prominent modes, however, in which obligations are created, are voluntary engagements, whether one-sided or by way of joint agreement, whether by convention or by wrong-doing. These modes of origin are, indeed, so prominent, that in Gaius' and Justinian's Institutes they are treated as though they, together with a few facts analogous to them (*quasi-contractus, quasi-delicta, variæ causarum figuræ*), constituted the sole modes in which obligations arose; but, in fact, one of the most

obvious modes of origin is that of the operation of the law of intestate succession, or of a testator's will or codicil. In both these cases the heir was laid under a variety of obligations towards a variety of classes of persons, as creditors, legatees, and persons for whom they held property in trust.

Similarly guardians of various kinds, and their wards, had cast upon them by law or by will a vast assemblage of reciprocal obligations. But all this important class of topics finds its proper place in the account of the law of succession or of family law.

Wherever, again, a magistrate directed one person to make a payment to another, or to give security, or to bind himself to another, or another to himself by a judicial oath, an obligation is created.

A more important division of obligations, inasmuch as it reacts on their binding character, is that based on the possible diversity of their origin, whether from the old civil law, or from the Prætor's equity, following the broad principles of practical justice laid down in his edict. But here, again, a fresh division presented itself, inasmuch as the Prætor recognized some agreements (*pacta prætoria*), as creating obligations valid for all purposes, and others, based merely on humane considerations, as creating obligations only good by way of plea or defence, or good for retaining money received, not for claiming money due (*naturales obligationes*).

It was in view of these various, though disparate, origins of obligations that Modestinus said that "we are bound either by matter of fact (*re*) or by words, or by fact and words together, or by consent, or by statute law (*lege*), or by prætorian law, or by compulsory circumstances (*necessitate*), or by wrong-doing." "Compulsory circumstances" (*necessitas*) are illustrated by the case of the "necessary" heir, that is, the heir who, being a slave, had no alternative but to enter on the inheritance and accept his freedom. L. 52, D. (xliii. 7). Gaius (ii. 153).

It is obvious that this classification is illogical and based on cross-divisions; but it is at least serviceable as showing that, in spite of the prominence given in the

Institutes to contracts and delicts as grounds of obligation, the best Roman lawyers were fully awake to the broader and distinctive character of an obligatory relationship as brought into existence by a great variety of facts.

The grounds of obligations recognized in one department or another of Roman law are exhibited in the table on page 199.

The consideration of the various topics included in this scheme, so far as they do not more properly belong to other heads, as is the case with guardianship and inheritance, will conveniently be taken in the following order:

I. Civil and natural obligations.

II. Voluntary engagements comprising:

1. Single-sided engagements (*pollicitatio, votum*).
2. Two-sided engagements (*contractus, pacta*).

Certain important groups of contract looked at collectively.

(*a*) Bankers' contracts.
(*b*) Shipping contracts.
(*c*) Insurance contracts.

(1) Formal agreements (*contractus*).

(*a*) By passing a material thing (*re*) or one-sided execution.
(*b*) By solemn words (*verbis*).
(*c*) By writing (*scriptura*).
(*d*) By sufficiently ascertained consent (*consensu*).
(*e*) By act or acts importing in certain special cases reciprocity of expectation.

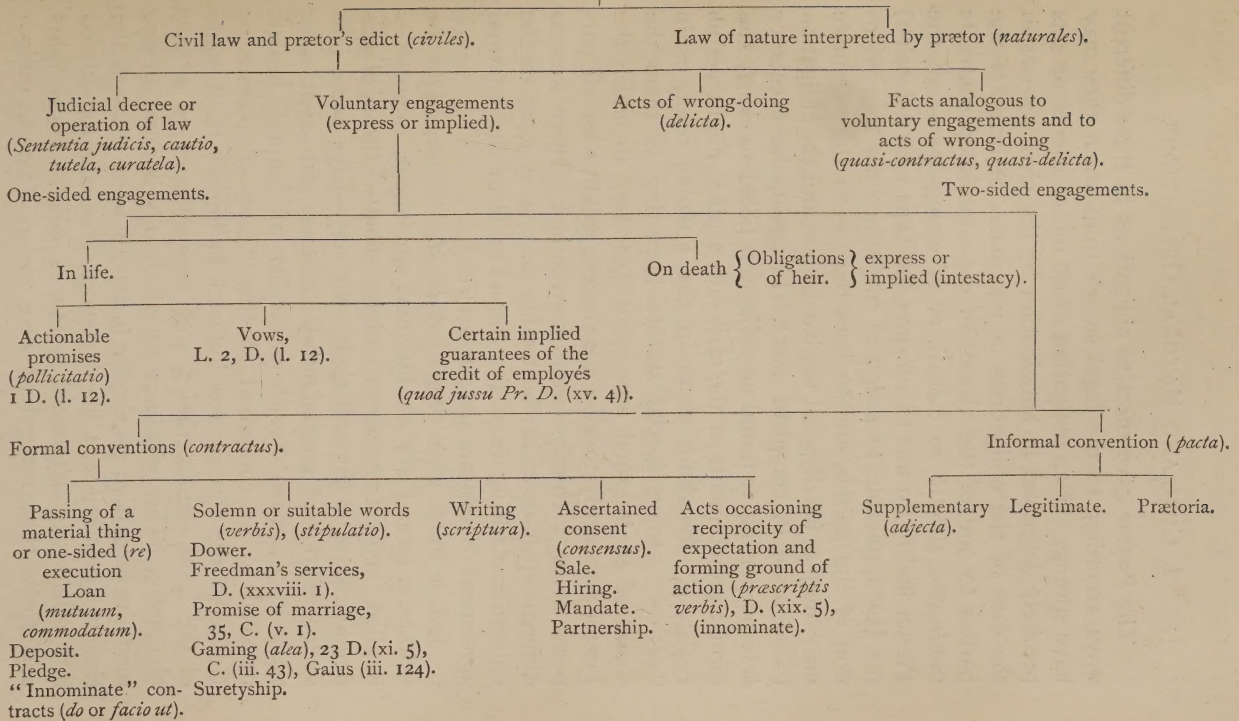
(2) Informal agreements (*pacta*).

(*a*) Supplementary (*adjecta*).
(*b*) Operating by force of special statutes (*legitima*).
(*c*) Prætorian.

III. Acts of wrong-doing (*delicta*); remarks on criminal law.

IV. Facts analogous to convention and to acts of wrong-doing (*variæ causarum figuræ, quasi-contractus, quasi-delicta*).

ORIGIN OF OBLIGATIONS.


Civil law and prætor's edict (*civiles*).
Law of nature interpreted by prætor (*naturales*).
Judicial decree or operation of law (*Sententia judicis, cautio, tutela, curatela*).
One-sided engagements.
Voluntary engagements (express or implied).
Acts of wrong-doing (*delicta*).
Facts analogous to voluntary engagements and to acts of wrong-doing (*quasi-contractus, quasi-delicta*).
Two-sided engagements.
In life.
On death { Obligations of heir. } express or implied (intestacy).
Actionable promises (*pollicitatio*) 1 D. (l. 12).
Vows, L. 2, D. (l. 12).
Certain implied guarantees of the credit of employés (*quod jussu Pr. D.* (xv. 4)).
Formal conventions (*contractus*).
Informal convention (*pacta*).
Passing of a material thing or one-sided (*re*) execution
Loan (*mutuum, commodatum*).
Deposit.
Pledge.
"Innominate" contracts (*do* or *facio ut*).
Solemn or suitable words (*verbis*), (*stipulatio*).
Dower.
Freedman's services, D. (xxxviii. 1).
Promise of marriage, 35, C. (v. 1).
Gaming (*alea*), 23 D. (xi. 5), C. (iii. 43), Gaius (iii. 124).
Suretyship.
Writing (*scriptura*).
Ascertained consent (*consensus*).
Sale.
Hiring.
Mandate.
Partnership.
Acts occasioning reciprocity of expectation and forming ground of action (*præscriptis verbis*), D. (xix. 5), (innominate).
Supplementary (*adjecta*).
Legitimate.
Prætoria.

I. Civil and Natural Obligations.

The Prætor gave effect to obligations in three different ways, according to the legal source from which they may have sprung. If an obligation arose out of events or acts precisely described in anticipation by the civil law—as in the case of the obligations of guardians, of heirs, of the parties to one of the classes of old-established contracts (*contractus* strictly so called), or of wrong-doers—all the Prætor had to do was to interpret (perhaps with extension) the law applicable, to assign or conjecture the true intention of the parties, and to lend the use of the executive machinery at his disposal to give the law, and the obligation based upon it, complete effect. If, again, the events or acts purporting to found an obligation failed to satisfy the formal requirements of the civil law, a place might yet be found for them in the Prætor's edict, or in some special statute imparting to them the shape of an informal agreement (*pactum*), to which the Prætor was ready to give a complete validity for all purposes as to a strictly formal convention. There was no difference whatever in the quality or cogent force of the obligations arising from the formal or from the informal agreement (*contractus* and *pactum*).

L. 7, § 7, D. (ii. 14).

But a third case presented itself. There might be neither a formal nor an informal agreement, express or implied ; and yet two persons might—whether through accidental events or through their own acts—have come into such a relation of an obligatory character with each other that, in accordance with principles of natural justice, believed to be comprised in the "Law of Nature or Nations," the Prætor was induced to impute to it some of the legal characteristics and consequences of a true obligation. The principles on which this imputation was made in successive particular instances were, through the frequent recurrence of like instances, gradually formulated into a distinctly announced system of relief. These rights and duties thus recognized were called "natural obliga-

tions." The facts from which they might spring were various, such as the actual advance (*numeratio*) of money to another or on another's behalf, making a gift of a kind to call for a recompense, agreements arising merely from consent and not resting on any basis known to the law (*nuda pactio*), or the mere fact of becoming enriched at another's expense.

L. 16, § 4, D. (xlvi. 1). L. 126, § 2, D. (xlv. 1). L. 25, § 11, D. (v. 3). L. 7, § 4, D. (xiv. 2). L. 14, 15, D. (xii. 6).

Similarly "natural obligations" were held to be created where a person was, through the strict operation of law, exempted from, or not impelled to, a duty which, from some points of view, was morally incumbent on him, and which he in fact performed. The performance could not be legally undone; money paid in pursuance of the duty could not be recovered back; the duty might, by a special or fresh agreement (*novatio*), be converted into a strict civil obligation; pledges and sureties were good in law as securities for the performance of the duty, and the performance might be pleaded in bar to an action.

L. 1, § D. (xlvi. 2).

Instances of this latter class of imputed natural obligations are supplied by the case of payments made by wards of various classes, from the consequences of which, owing to the absence of the guardians' intervention in their contract, they might, in strict law, have excused themselves; a repayment between brothers, in their parents' control, of a debt due on a loan from one to the other; repayment by one in his father's control of money advanced to him by a money-lender, in defiance of the prohibitions of the *Senatus consultum Macedonianum.*

L. 10, D. (xiv. 6). L. 10, D. (xiv. 6).

II. Voluntary Engagements.

The policy in pursuance of which Roman law permitted and encouraged the creation of obligations by spontaneous acts was much the same as it has been in other systems of law, though one aspect of the policy was more prominent in the earlier stages of that law, and other aspects in the latter stages.

The two main grounds for the policy of giving legal validity to the voluntary acts of citizens are, (*a*) the importance of maintaining the traditional reverence for well-established formalities, with a view to basing the institutions of the State on the solid foundation of national usage as commending itself to the affections and unanalyzed instincts of the people ; (*b*) the importance of substantiating public credit, and, in a wider sense, satisfying such expectations as may be held to be reasonable and natural, that is, prompted by the customary conditions of social, industrial, and commercial intercourse. In earlier times the first of these grounds is the paramount one. The predominance of it is manifested in Roman law in the legal sanctity which, from times immemorial, attached to the fictitious sale, or *mancipatio,* and to the verbal contract of question and answer styled *stipulatio.* In the case of the fictitious sale, it was the outward formalities of the balance, the striking of it with a coin, the presence of the five witnesses, and of the balance-holder, that drew to themselves the whole attention of the law and of those who administered it. Where the ceremony was complete, it was full and final evidence not only of itself, but of the intention of the parties and of all the mental conditions needed to characterize an entirely voluntary and deliberate act. So with the *stipulatio,* in which, by "inverting the natural position of the parties" and "effectually breaking the tenor of the conversation," the necessity of putting the promise interrogatively prevented the attention from gliding over a dangerous pledge (Maine's "Ancient Law, p. 329"). The prescribed formality contained its own security for the proper mental disposition of the parties. Whether the fictitious sale of the *mancipatio* or the engagement by *stipulatio* were first in the order of historical development, it is, at all events, certain that they both indicate a period when it was held of small moment what was the immediate object of the obligation, or what was the real intention of the parties, or whether one party only or both parties were bound to some future act. The only relevant question was whether the outward ritual had been strictly conformed to.

The *stipulatio*, indeed, lasted to the latest period of Roman law, though Justinian in his Institutes and Code embodies the "Leonine constitution," by which "all stipulations, in whatever words they might be couched, whether solemn and direct or not, were to be held valid, provided the consent of the contractors were sufficiently expressed." L. 1, J. iii. 15. L. 10, C. (viii. 38).

Again, while the practice of concentrating attention on the outward ceremony, as illustrated by the use of the *mancipatio* and of the *stipulatio* in its earlier and more rigid form, was silently giving way to the doctrine of the importance of substantiating credit by giving legal aid to the enforcement of all kinds of deliberate engagements, a third and still wider principle was also making itself felt in the field of law, to the effect that it is generally expedient that all solemn and voluntary acts between man and man should attain their purpose rather than become abortive and nugatory (*ut res magis valeat*). The practical application of this principle co-operated with the due recognition of the other two principles, previously mentioned, through the increasingly recognized importance of preserving good and unassailable evidence of all solemn declarations of will. In Justinian's legislation the repeated requirements of writing, or of the signature of writing in the presence of witnesses,—as of ecclesiastical officials in Church, or of entry on the public registry (*apud acta forensia*), or on the Church registry, or of solemn oath in the presence of the magistrate, —all point to the growing significance of this element in the character of voluntary engagements as made binding in law, that is, as the converted into sources of obligations.

Assuming, then, that the principle is fully recognized of regarding voluntary engagements as the possible sources of obligations, what the essential properties of such engagements are is plain enough. There must, at least, be two parties to them; though one of them may, for a time, be undetermined, and the duties accruing may all be on one side and the rights on the other, or the rights and duties may each be distributed more or less equally between the parties. There must also be some act, or series of acts,

or combination of acts, by which the parties signify to each other their mutual understanding of the engagement made by one of them, at the least, and of the common expectations to which that understanding on both sides gives rise.

It may happen, indeed, that one of the parties is, at the time of the engagement and long afterwards, purely passive. Thus, a person may make a promise in favour of any one who comes forward by public advertisement, as for the purpose of using an advertized ship or tavern ; or in favour of one who presents himself, on being solicited by general invitation, to have dealings with a slave at his master's risk (*quod voles cum Sticho servo meo negotium gerere periculo meo*) ; or in favour of one who has already done his part in a general arrangement previously come to, or made delivery or paid the price on a sale.

L. 2, D. (xv. 4).

In all these cases the real engagement proceeds only from one of the parties, though the expectations it creates are two-fold and mutual. The person in favour of whom the engagement is made, so soon as he is determined, and has taken his share, in the act or acts of mutual communication of will, expects fulfilment of the engagement. The person making the engagement expects that the fulfilment will be insisted on. There is complete reciprocity between the parties, and all the indispensable conditions of a true agreement, convention, or contract, are present. It remains only for law to say on what further conditions, if any, it will choose to insist, whether for the purpose of stimulating or checking certain classes of engagements, or simply of securing satisfactory judicial proof, and preventing frauds.

These considerations show that a division of voluntary engagements into those which are one-sided and those which are two-sided must result in breaking up the class of agreements into two arbitrarily separated compartments, one of which compartments ranks on a par with the class of testamentary dispositions and of succession on an intestacy. Nevertheless there was a distinct class of

voluntary engagements which were considered as valid grounds of obligations, and which differed from all other classes of voluntary engagements, partly in the indeterminateness of the persons in whose favour they were made, and partly in the want of distinct reciprocity of consent and expectation existing between the parties.

For the purpose of considering these engagements in juxtaposition and as opposed, in the way conceived by the Roman lawyers, to all other conventions in respect of which both parties were determinate from the first, and in which the reciprocity of consent and expectation was unmistakably distinct, they may be grouped together as follows under the title :

1. *ONE-SIDED ENGAGEMENTS.*

(1) Certain classes of public promises (*pollicitatio*).

(2) Public vows (*vota*).

(3) General engagements to the public made in respect of employers in certain industries, trades, or occupations (*quod jussu*).

(1) Public Promises.

Where a person undertook (*pollicitatio*), in return for some dignity conferred upon him or to be conferred upon him, to construct some public work for the government of a provincial city, he was held liable to make good his word, and if he delayed beyond the time fixed for completing it he was liable for interest. Where he made the undertaking merely from general good-will and not by way of recognizing benefits past or future, he was only liable in certain special cases. Such cases were : his having already begun the work, or induced the government to begin it themselves by promising to pay for it ; or the purpose of the work being the repair of damage caused by a fire, earthquake, or sudden fall of buildings. D. (l. 12).

Where the work had to be completed in consequence

of the original undertaking being due to a sense of services to the promisor past or to come, his heir was held liable for the whole amount. Where, in like case of failure to complete the work, it was the partial performance of the undertaking which originated the legal obligation, the heir, if one of the promisor's children, was liable either to have to complete the task or to contribute towards its completion to the extent of one-tenth of the patrimonial estate; if the heir were not one of the children, he was liable either to have to complete or to contribute to the extent of a fifth of the patrimonial estate. If the promisor himself became impecunious after the work were already begun, his estate was liable to the extent of one-fifth part of it.

(2) Public Vows (*vota*).

L. 2, D. (l. 11).

Where a person solemnly consecrated some thing of which he was owner to a sacred purpose, he was to be under an obligation to the persons in charge of the sacred edifice on administering the sacred rites to make his vow good. The vow was said to bind the maker of it and not the thing vowed. Where a person vowed a fractional part of his whole property, as, for instance, a tithe, it was not till it was separated that it ceased to belong to the person consecrating it. If the person who made the consecration died before the part or thing was detached, the heir was liable.

(3) Engagements to the Public (*quod jussu, exercitoria actio*).

D. (xv. 4).
2 J. (iv. 7).
D. (xiv. 1).
D. (xiv. 3).

Where a person held out to the public generally by advertizement, or by express or implied instructions or license, or subsequent ratification, that he would be responsible for all engagements made by his slave or son in the conduct of certain thereby specially authorized business, and more particularly as in the management, for the master's or father's profit, of a merchant ship or of an

hostelry or banking business, he was legally liable for his employé's contracts as though they had been made in his name. This subject has a special connection with the contract of affreightment, to be discussed lower down.

2. *TWO-SIDED ENGAGEMENTS.*

There are two kinds of policy which the law may observe with respect to agreements, and, as civilization progresses, they tend to converge to the same practical consequences. Either all voluntary agreements may be presumably held good in law as sources of valid obligations, only a few being excepted on certain specially assigned grounds; or no voluntary agreements are admitted as sources of obligations but those which satisfy some well-understood test.

In Roman law the latter policy was followed from the first. At the beginning, the contracts of fictitious sale (*mancipatio*) and of question and answer (*stipulatio*) probably long represented the only admissible sources of conventional obligation. The facts of social and industrial intercourse, as well of mercantile relationships with foreigners, gradually extended the range of legally authorized agreements or *contractus*, strictly so called, till the climax seemed to be reached in the indefinite list of what, in later times, have been called "innominate" contracts, where the mere performance of an act by one party, in contemplation of future reciprocal response by the other (*facio ut facias*), was held a sufficient call for the law to intervene and, by attaching a true and valid obligation, to compel the response.

But even thus the admissible contracts were found to be far below the requirements of so active a commercial community as the Roman. The Prætor found himself obliged to recognize, in special cases, and gradually to licence generally by his edict,—with or without the support of occasional statutory legislation,—large classes of voluntary engagements of a conventional kind, in which all the formalities formerly insisted on were absent or dispensed with,

and constantly widening classes of permissible objects were countenanced. Another climax was reached when the Prætor, in his edict, announced himself as ready to hold good all mere agreements (*pacta*) which satisfied the negative condition of being free from fraud and not conflicting with any positive law or statute.

L. 7, § 7, D. (ii. 14).

Before proceeding to enumerate in detail the more familiar and common contracts of Roman law, it will be convenient to present, at one comprehensive view, certain leading classes of contracts on which, in Justinian's time, for obvious economical and social reasons, peculiar attention was bestowed. The topics of the several classes of contracts were—

(*a*) Banking.
(*b*) Shipping.
(*c*) Insurance.

(*a*) Banking Contracts.

The position of bankers at Rome, both in Justinian's time and under the earlier empire, was so prominent an one, and their duties were so onerous and multifarious, that they present a sort of conspicuous focus, to which a number of leading contracts converged, and in the light of which they can be, in anticipation of more particular treatment, comprehensively surveyed.

Bankers were variously termed *argentarii*, *numularii*, and *mensularii*. The private bankers of the higher class were the *argentarii*. They were under the general control of the præfect of the city. The *numularii* were an inferior class, mostly, though by no means exclusively, concerned with testing and changing money. The præfect of the city seems to have had a special disciplinary authority over them. The *mensularii* seem to have been the responsible and acting members of the higher class of banking firms.

L. 2, D. (i. 12).

L. 1, § 9, D. (i. 12).

All bankers formed one legal corporation (*collegium*), of which the several members voluntarily grouped themselves

into partnership firms (*socii*). They were licensed to occupy certain public premises in the Forum; whence one sort of act of bankruptcy was described as withdrawing from the Forum (*cedere foro*).[1] The right of occupation could be alienated by sale.[2]

[1] L. 7, § 2, D. (xvi. 3).
[2] L. 32, D. (xviii. 1).

The functions of bankers were much the same as now, except that they acted, in some respects, as estate agents, attending auctions, purchasing inheritances for their customers; but this may be treated rather as a mode of monetary investment, and so equivalent to a modern purchase of stock and government securities. Their usual functions comprehended the receiving of deposits, on which they might or might not give interest; the making of loans, for which they usually required some material security or pledge; cashing cheques (*perscriptiones*) drawn on them by their customers; and negotiating foreign bills (*permutatio*).

Gaius (iv. 126). L. 18, D. (v. 3).

Cic. ad Fam. (iii. 5). Ad. (v. 15).

Bankers were expected to keep rigid and distinct accounts of every payment or receipt to, from, or on behalf of their customers, with the date of the day and year. In the case of judicial proceedings, these accounts had to be furnished among the particulars of the claims on which the action was founded (*editio*). From time to time bankers and their customers settled their accounts, returning securities and, after ascertaining the balance of indebtedness, making a formal acknowledgment and promise to pay it (*constituere pecuniam*).

L. 4, D. (ii. 14).

L. 47, D. (ii. 14).

In Justinian's time the bankers seem to have had some trouble with their rich and influential customers, and besought the emperor's special intervention, which he vouchsafed by legislation, as appears in the Novells and Edicts. The main complaints were that their customers pressed them to be securities for them to creditors, and that the customers, instead of satisfying these creditors with money which came into their hands, diverted it secretly to other purposes; that their customers objected to the publicity

attending the public proof of disputed securities as required by law; that their customers were reluctant to pay interest without an express agreement; that they had not sufficient security for their advances; and that heirs had a habit of repudiating their ancestors' liabilities.

Justinian to some extent remedied this state of things by a series of enactments, which seem to be based on the special consideration that bankers are a class of men who pass their life in "giving, receiving, being sureties, and paying interest." It was enacted that bankers should only be liable on a security given to their customers' creditors where the instructions to undertake such security were clearly expressed in writing, or, in default of writing, where the customers applied to have the security made good within two months of the liability attaching. Private agreements were to carry the same weight of proof as those publicly authenticated. Heirs, if found to have denied groundlessly an ancestor's loan, were to make good double the amount. Bankers were better protected against fraudulent transfers by their customers who were indebted to them; and the rule was dispensed with in their favour, that proof must first be given of a debtor being really unable to meet his liabilities before hypothecated property, wrongfully sold, could be followed up.

(*b*) Shipping.

The subject of shipping contracts may be distributed under the four heads of—

(*a*) Chartering of vessels.
(*β*) Affreightment, bills of lading and insurance.
(*γ*) General average.
(*δ*) Nautical tribunals and jurisdiction.

(*a*) Chartering of Vessels.

There were three classes of persons concerned in making contracts relating to navigation: the owners of vessels; the charterers (*exercitores*), who were directly interested in the profits of the current voyage and adventure; and the

master of the ship, intrusted, for the time being, not only with the nautical management, but with the charge of the merchandize, and even with its ultimate disposition and sale. The general rule was, that the charterer was liable on all the contracts made by the master for the safety of the ship or of its crew, and the general success of the adventure. The theory was that, but for such exceptional and somewhat indefinite liability, the master would never obtain credit in foreign parts. If the master had occasion to borrow money for repairing the vessel, the lender was not expected to see that the money was properly laid out, but only that repairs were needed. It may be said generally, with respect to the charterer's liabilities, that they were interpreted liberally in view of the policy on behalf of which they were recognized; "a ship," "a master," and the occasion of the debt, being understood, without reference to technical definitions.

L. 7, D. (xiv. 1).

(β) Affreightment, Bills of Lading, and Insurance.

The practice with respect to affreightment and marine insurance in Justinian's time may be gathered from the report of a Commission appointed by him which is contained in the Novells, and which is based on the evidence of shipmasters and shipping agents specially summoned. The evidence related to well-established customs, and was given on oath. It appeared that various usages were recognized, according to the will and pleasure of the creditors or agents who advanced money to pay the freight and insurance. One kind of contract was for the agent to advance, for the voyage, a fixed sum for freight, proportioned to the bulk and weight of the merchandise—as so much for each bushel of wheat or barley—and also the insurance money, but not the customs dues, and to incur the whole risk of the adventure. The profits of the enterprise would thus be available to refund the agent for all advances.

Nov. (cvi.).

Another sort of contract was simply to advance so much

by way of interest, calculated not for any definite time, but till the ship's return in safety, the creditor having the greater profit, the longer the voyage. On the return of the ship, thirty days were allowed for the payment of the accumulated interest or other advances, but no interest was payable till the goods were sold. If the debt continued unpaid, interest could only be reckoned at the ordinary rate and no longer at the rate permissible for nautical contracts,—that is twelve per cent.

From the constitutions contained in Cod. xi. 1, it appears that shipmasters were furnished with documents resembling modern bills of lading, and that they sometimes committed the irregularity of trading with the merchandise on their own account. Where a shipmaster or shipowner became insolvent, and his goods were sold, a purchaser was obliged to undertake the liabilities of the seller, so far as shipping was concerned, and to the extent of the goods bought.

C. (xi. 2).

(γ) General Average (*Lex Rhodia de jactu*).

The old Rhodian laws of navigation recognized the principle of exacting equitable contributions from the owners of cargo and of the ship for all losses incurred voluntarily for the purpose of saving the ship. The principle was embodied in the Digest chiefly through the medium of extracts from Paulus. But it appears, from a passage (L. 9) in the same title of the Digest, that the Emperor Antoninus Pius gave complete legislative sanction to the whole of the Rhodian navigation law, so far as it did not conflict with Roman law.

D. (xiv. 2).

There were various possible cases in which part of the merchandise had to be sacrificed for the good, or rather safety, of the whole. Such cases were the necessity of lightening the ship in consequence of a violent storm, of which an instance is presented in the account of St. Paul's journey to Italy in a corn-ship of Alexandria; the redemption of the ship or the merchandise, or part of it, from pirates; the necessity of entering, for refuge, a shallow

river or harbour; or of transmitting the cargo in small and insecure boats or rafts.

The damage or loss must be voluntarily sustained,—that is, not inevitable,—though the owner need not, and usually could not, be personally consulted. Incidental injury to the ship itself could not be a matter for contribution, unless, as in case of cutting away a mast, encountered at the actual or presumed desire of the owners of the cargo, and in apprehension of danger to come. The calculation of liability was made by comparing the common market value of what was saved and what was lost. If any of the owners of the saved cargo was insolvent, the loss fell on the other owners and not on the master of the ship.

(δ) Nautical Tribunals and Jurisdiction.

When a shipwreck had taken place, it was the duty of the charterer or his representative, the shipmaster, to lose no time in presenting himself before the district judge, and proving the facts, for further reference to the præfect of the province within the year. Where a further judicial examination took place, two or three of the crew as naval assessors were to sit with the judge. If the crew were all lost, the sons of some of them, or of the master, might similarly help in the inquiry, in order to ascertain the truth of the facts attending the loss of the ship as alleged by its owner. C. (xi. 5).

The judge had to inquire into all complaints of robbery, fraud, or imposition suffered by shipwrecked mariners or by freighters. If within two years of presenting a formal statement of claim or complaint (*libellus*, *interpellatio*) the hearing had, through the judge's neglect, not taken place, the shipowner was held at most only responsible for half the amount of damages, and the judge himself had to make good the rest. L. 5, C. (xi. 5).

(*c*) Insurance Contracts.

It does not appear that the Romans availed themselves of contracts of fire or even of life insurance. But the

liberal provisions made for facilitating advances on goods at sea amounted to the recognition of a species of marine insurance, and the legal principles at the base of this recognition were of a kind to have a far wider application. Thus in the title of the Digest, on "Nautical Interest," a passage is given from Scævola's "Responses," in which he says that the interest allowed is the "price of the risk," and allows a legal obligation to arise where an advance is made and, in the event of some condition even of a personal nature not happening, a sum in excess of the loan is to be paid back, provided only the affair be not of a gambling kind. Instances are supplied by loans to fishermen for the purposes of their occupation, to be repaid only if they have a successful haul; or to an athlete to pay the expenses of an exhibition, to be repaid in case he wins a victory. These contracts are of the nature of an insurance by the fishermen and the athlete against the losses attending possible failure.

D. (xxii. 2). L. 5.

The calculation of a life-interest, and therefore, implicitly, the radical principle of life-insurances, was quite familiar to the Roman lawyers, who resorted to it especially in capitalizing an usufruct or a grant of alimony. Thus, according to Ulpian's computation, from birth to the twentieth year, the value of a life was to be taken at thirty years; from the twentieth and twenty-fifth year, at twenty-eight years; from the twenty-fifth to the thirtieth year, at twenty-five years; from the thirtieth to the thirty-fifth year, at twenty-two years; from the thirty-fifth year to the fourtieth year, at twenty years; from the fortieth to the fiftieth, at so many years as the year of life was short of fifty-nine years; from the fiftieth to the fifty-fifth, at nine years; from the fifty-fifth to the sixtieth year, at seven years; at and from sixty years onwards, at five years. Another more inartificial as well as incomplete mode of computation said to be in use was to count a life good for thirty years at any time from birth to thirty years of age, and afterwards, as good for as many more years as were lacking of sixty years.

L. 68, D. (xxxv. 2).

(1) Formal Agreements.

Formal agreements or contracts (*contractus*), strictly so called, are conveniently arranged with reference to the common facts and exigencies of social life, of which they are the expression, and which also mark the successive stages of spontaneous development in the history of this part of the older Roman law. It was seen above that the essence of an agreement consists in some act, or assemblage, or succession, of acts, in which two persons take part, and by the medium of which each communicates to the other the fact of his own expectations and a ground for the other's expectations. The law may or may not attach a legal significance to such acts, and thus occasion reciprocal expectations and create out of them legal obligations. And the law may either accept ordinary judicial proof of the acts having been done or may demand certain special proof, either by requiring some supplementary evidence alien to the nature of the acts themselves, as that a contract of pledge or of sale should be in writing, or by insisting that the acts should be performed in some definite way.

The Roman contract of *stipulatio* was an instance of this last method, in which, unless the words of the engagement were fully and accurately expressed by the promisee, no engagement was held to have taken place. The consensual contracts, including sale, letting, partnership, and agency, were instances of the law requiring no evidence other than ordinary judicial proof of the acts of effective mutual communication.

The formal agreements, as classed according to the evidence of their existence required by law, were the following. Those signified:—

(*a*) By passing a material thing or by one-sided execution (*re*).

(*b*) By solemn words (*verbis*).

(*c*) By writing.

(*d*) By mere ascertained consent.

(*e*) By certain classes of acts causing reciprocal expectations.

(*a*) Agreements Signified by Passing a Material Thing or by One-sided Execution (*re*).

This class of agreements, which must be almost coeval with the history of civilization, include some of the commonest engagements of social and industrial life. The most noticeable of them were—

(*a*) Loan (*mutuum, commodatum*).
(β) Deposit, including sequestration.
(γ) Pledge.

These three classes of contracts may be considered together, the general nature of them being sufficiently understood from their popular designation.

(*a*) Loan (*Mutuum, commodatum*).

The contract of loan includes both the loan of things (*mutuum*) which, being necessarily consumed by use (as grain, food generally, and money), can only be returned in a representative form by their material equivalents, and the loan of things (*commodatum*) which can be returned in the identical form and integrity of constitution in which they were borrowed. When a contract of loan was reduced to writing, a plea that in fact the money had never been paid to the alleged borrowers (*non numeratæ pecuniæ*) might be resorted to within two years of the alleged fact of loan. If the plaintiff, nevertheless, by evidence of a general kind proved that the money was paid over, the defendant was liable to make good double the amount, unless the plaintiff tendered him the judicial oath and he confessed the debt. If this took place at the outset of the proceedings and before other proof was resorted to, the defendant had simply to pay the amount of the original loan; if this took place after other proof had been offered, he had, in addition, to pay for the expenses of procuring this proof.

L. 14, C. (iv. 30).

Nov. (xviii. 8).

If the plaintiff who had made the loan had taken

security for it or for an unpaid balance of it, or for unpaid interest, the plea that the money had never in fact been advanced was only available for thirty days subsequent to the security being taken, and the defence by judicial oath was not more available than the other plea.

It has been already seen, under the head of "illegal and impossible objects" for obligations, how far claims for interest were permissible and loans to expectant heirs forbidden by the *Senatus consultum Macedonianum.*

Where the loan was of things which had to be returned in their individual integrity (*commodatum*), it was important that they should be kept in proper condition; and as the loan in this case was for the borrower's benefit solely (otherwise it was a letting or hiring), he had to take the utmost care of what was intrusted to him, and, if necessary, to incur all necessary expenditure for that purpose or for needful repairs entailed by his remissness. If he lost possession through the slightest negligence, he had to recover it or to make good the loss to the lender. The lender, on the other hand, was bound to make good all expenses incurred about the thing lent, and for which the borrower was is no way responsible; and if the borrower had, in case of the thing being lost, paid its value to the lender, the latter was bound to transfer to the borrower his rights of action against third persons, and in the event of the thing subsequently coming into his hands, to restore it or its value to the borrower.

Allied to the contract of loan is that which is called *precarium*, in which it was said that the owner of a thing parted with it on condition that he should receive it back at any moment he chose to ask for it. D. (xliii. 26).

(β) Deposit.

On a contract of deposit a thing was left by one person in the charge of another for the sake of its safe preservation. There must be no payment nor advantage to the person with whom the deposit was made, nor anything to be done to or about the thing other than keeping

it safely. If more than the most ordinary kind of diligence was expected a special agreement must accompany the act of deposit; but no agreement could exempt the person in charge from the consequences of bad faith, because such an agreement would have been against public morality. If consumable things were deposited, it must depend on the actual circumstances whether they were to be returned in *specie* or otherwise. Thus, where an open bag of gold coin was deposited, it might be concluded that the identical coins need not be restored.

D. (xvi. 3). L. 10, C. (iv. 34).

One important kind of *deposit* was *sequestration*, in which a thing forming the subject-matter of dispute was deposited in the hands of some, presumably, impartial person (*sequester*) to await a settlement, by judicial decision or otherwise, of the controverted point. The terms of the sequestration were arranged by the parties, and among these terms were the place at which redelivery was to take place. If no place was fixed, the thing ought to be handed back to the Prætor. The action against the sequestrator was called *depositi sequestraria actio.*

D. (l. 16). L. 110, D. (l. 16). L. 5, D. (xvi. 3).

(γ) Pledge or Mortgage.

A contract of pledge was made when a person gave into the hands of another, by actual or symbolical transfer, something to serve as a security for a debt. So soon as the pledgee entered on his quasi-possession—because it was said that, for some purposes, the possession of the pledger still continued—he was a limited owner, and as such his rights and duties have already been discussed. The appropriate action against the pledgee was the *pigneratitio in personam actio*, to which corresponded a *contraria actio* against the pledgor for expenses unavoidably incurred in taking care of the property pledged or involved by the culpable remissness of the pledgor, or through the consequences of his defective title to the property.

Where a mortgaged estate produced fruits, whether

from vegetation or from living beings, or accidental gains were obtained by the fall of trees or destruction of buildings, the resulting profits were to go to the reduction of the debt. The *pigneratitia actio* was available to compel the creditor, on a sale in accordance with the contract, to pay over the balance remaining after paying himself the debt and expenses. The creditor was not responsible for unavoidable losses or disasters. D. (xiii. 7). C. (iv. 24).

(*b*) Agreements signified by the use of Solemn Words (*verbis*).

The contract of question and answer or *stipulatio*, in which the promisee and questioner put the terms of the engagement in a precise verbal and catechetical form, and the promisor simply replied "I promise" (*spondeo, promitto, fide-promitto*), is usually taken to have been the only instance of a contract which was effective by the mere use of the simplest ritualistic form of words. But there are some hints that there are other forms of words equally potent in the case of a few special classes of contracts, such as, for instance, the old and afterwards obsolete proceeding on promising a dower, and on obtaining from a freedman a promise of future services. In the times best known to us, the contract of question and answer had, even in respect of these special contracts, absorbed its rivals, and in Justinian's time still continued, though relieved of all technicalities by Leo's constitution, to occupy the whole field of verbal contracts. L. 10, C. (viii. 38).

It was thus, then, sufficient that the parties should throw their mutual engagement into the outward form of a question put by the promisee (*stipulator*) and an answer given by the promisor. It mattered not what language was used by the parties or by either of them, provided each understood the other, and the answer was suitable to the question. A stipulation might be conditional in form or contain a condition in it, or it might depend for its validity on the hypothetical truth of some fact of which one of the parties professed to be in doubt.

Where, in the circumstances previously described, there were many parties to one obligation, the stipulation out of which it may have arisen would be repeated a sufficient number of times to secure that each promisee severally replied for himself to the promisor's interrogation, or, conversely, that each promisor severally for himself put the promise to the promisee. A slave could stipulate (that is, put the question) on behalf of his master, and a slave owned by several masters in common, on behalf of all, or, —by special direction,—of any one of them. Where he made an acquisition in this way without orders, his several masters shared the gains in proportion to their shares in the common slave.

Besides the ordinary voluntary stipulations which thus figured so largely in social and industrial life, it was customary for certain magistrates, as the Prætor, the Ædiles, and other inferior officers, in the course of exercising their jurisdiction, to force litigant parties appearing before them to enter into stipulations for the sake of binding the future acts of one of them towards the other. These stipulations were called "judicial," "prætorian," or "ædilititian," as the case might be. They related to such matters as giving security against fraud, or against doing some threatened damage to property, or restoring money wrongfully retained, or protecting a ward's property when in jeopardy.

The most important and familiar use of the stipulation was for giving personal security (*fidejussio*), especially in case of a plurality of debts simultaneously created by a principal debtor. Sureties for a debt were, in principle, held to be each and all liable for the whole, and the creditor might sue whom he would, while, after payment, a surety must take his chance of recouping himself by suing the principal debtor. But he might relieve himself from this liability if he chose to avail himself of the privilege, first accorded by Hadrian, of requiring the creditor to distribute the actions and only to sue him for his proportionate share of the debt for which he was liable. Sureties could not bind themselves for more than

§ 4, J. (iii. 20).

the principal debt, though, of course, they could for less, and on no harder terms of any sort; and similarly sureties might bind themselves conditionally or for a time, while the principal debtor was bound absolutely. It has already been seen that a contract of suretyship is legally valid for a "natural" obligation, which itself could not be directly enforced.

A creditor might sue the sureties without suing the principal debtor; but if a creditor sold mortgaged estate without getting for it as much as he ought, he could not make up his loss by suing the sureties. L. 5, 18, C. (viii. 41). D. (xlvi. 1).

(*c*) Agreements Signified by Writing (*Litteris, scriptura*).

Before Justinian's time one of the most frequent modes of making a contract, as well as of legal proof of a contract made, was formal entry of the debt in the household account-books of the creditor. Accounts were kept with great regularity, the receipts and payments of each day being entered in ledgers (*adversaria*), and transferred once a month to the general account-book (*codex*, *tabulæ*). Every Roman had to take an oath once in five years before the censors that his bookkeeping was honest and accurate.

Entries in these accounts were receivable as evidence of money due. But the books were also used to reduce to a strict and simple form a number of separate debts, perhaps of only an equitable nature, and for which the remedies were tardy and circuitous. By entering them as a bulk sum on the household account-books (*expensilatio*), they could be sued for by the simplest and most general form of personal action, as for a liquidated and certain sum, with the collateral liability on the part of the defendant to make a penal engagement (*sponsio pœnalis*), for which, if not made good, he had to forfeit one-third of the amount in litigation. Gaius (iv. 171).

Sometimes the account-books were resorted to simply to transfer a debt from one person to another. This transfer of names (*nomina*) was the usual mode in which

bankers paid their customers' cheques. Formal entry on the account-books,—in which the creditor and debtor side had always to balance each other (*transcriptitia nomina*),—was sometimes a record of cash transactions (*arcaria nomina*).

In Justinian's time, the practice of keeping strict household account-books was still maintained, especially among bankers; yet any formal acknowledgment in writing of a debt was of the same probative value as proof, as in Gaius' time among foreigners was the *chirographa*, signed by the debtor, the *syngraphæ*, signed by both parties.

(*d*) Agreements Signified by the Mere Expression of Consent (*Consensu*).

There were a limited number of agreements which, either from their frequent recurrence, or from the recognized importance of facilitating them, or from the fact that inveterate social and economic usage had, in this field alone, anticipated the improvements of advanced law, required no formalities of any sort to be superadded to the fact of the mental concurrence of the parties. Of course, this mental concurrence must be signified by some act or acts of communication; but no limit was assigned to the character of these acts, or to the quality of the proof of them admissible in the courts of justice.

These contracts were restricted to four kinds, though even this restriction was, in Justinian's time, purely formal and almost antiquated, because, through the great extension given to pacts—a class of consensual agreements wholly out of the purview of the older civil law—the list of engagements giving rise to obligations by force of nothing else than the clearly indicated understanding of the parties was almost indefinitely extended.

The four classes of consensual contracts strictly so called were—

(*α*) Sale.
(*β*) Hiring.
(*γ*) Mandate or Agency.
(*δ*) Partnership.

(*a*) SALE (*Emptio venditio*).

A contract of sale was made when two persons agreed that one of them should deliver (*tradere*) something to the other in return for a price paid or to be paid. The sale was completed, and the mutual obligations, which were its result or outward expression, attached as soon as the two parties had in any way signified to each other their common consent. It was only when it was arranged that the contract should be reduced to writing that it was not held to be legally complete and efficacious unless it was so written and signed, either by the parties, or by the public clerk (*tabellio*) with their co-operation. In either case, however, if earnest-money (*arrha*) were given by the purchaser, and it was he who refused to fulfil the contract, he lost what he had advanced; and if it were the seller, he was liable to restore to the amount of double the earnest-money received.

L. 17, C. (iv. 21).

It will be noticed that the contract is that one should *deliver* something to the other. This seems to be a relic of a state of society when legal relations were of so simple and uncomplicated a kind that possession was not distinguishable from distinct ownership, or rather when complete technical ownership could only be imparted by use of the ceremonial of mancipation, and therefore the consensual contract of sale had for its range only those less prominent objects,—such as articles of food, clothing, and hourly necessity,—in respect of which ownership and possession were one, or else those things,—such as the new articles of foreign commerce or home industry,—to which the older ritual of mancipation and the notion of quiritarian ownership had not attached, and the fullest property in which could consequently be transferred by mere tradition, whether actual or symbolical. It is, indeed, expressly said by Ulpian in the Digest that "a seller is not obliged to make the buyer owner of what he buys," as he might be if he had formally promised so much. For a long time it seems to have required a special supplementary contract to render the seller liable in case

J. 25, D. (xviii. 1).

the buyer were evicted through the badness of the seller's title; but custom gradually raised a general presumption in favour of the existence of such a guarantee against the consequences of the buyers losing the benefit of the sale and of the value of the purchase-money through a superior title. This general presumption seems to have been first raised by the Ædiles' edict, which allowed to the purchaser an action on the contract of sale (*ex empto*) against the seller in case of eviction, at least where the sale was of things of substantive value and individual worth—as precious stones, ornaments, and the like—and for double damages, according to the terms of the usual engagement in such cases. The theory was alleged to be that "in judicial proceedings reaching to the general good faith of the parties, the custom and general practice ought to be recognized."

L. 31, § 20, D. (xxi. 1).

It thus appears that, both in the earlier and in the later law, from different reasons, the contract "to deliver" meant a contract to convey a right of ownership in the thing sold, so far as it was either possible for the vendor to convey such a right or as the purchaser might reasonably have believed him able to convey it.

The contract contemplates the payment of a "price," that is, a liquidated money value (*numerata pecunia*) of the thing purporting to be delivered. This contemplation of a price in money was said to be essential to the contract, and to distinguish it from one of exchange. It was not necessary that the price should be fixed with exact precision at the time of making the contract, provided it could be definitely ascertained at a later period, and that it did not rest with either of the parties to fix it as he liked.

§ 2, J. (ii. 23).

The subject-matter of a sale might be anything whatever of marketable value, and this included not only every kind of material thing not legally withdrawn from commerce—as religious, sacred, or state property—but so called "incorporeal" things. Such were rights of action on obligations; assemblages of rights and duties (*universitas juris*),—as an inheritance; the rights of an usufructuary or

an *emphyteuticarius;* and even the benefit of an expectation, as a future draught of fishes or a take of birds or of wild animals (*spei emptio, sine re venditio*). L. 8, §, 1, D. (xviii. 1).

There were a few select cases in which the consent to a sale was compulsory. Such cases were, (1) where land was needed for the use of the public, in which cases a reasonable price was fixed by arbitration; (2) where a later mortgagee on paying an earlier one his debt, could compel a sale to himself of the interest of the earlier mortgagee (*venditio pignoris causâ, necessitate juris*); (3) where one buried a dead body in a piece of ground, and was compelled either to remove it or to buy the ground; (4) and where the owner of a tomb could, by an extraordinary process, compel the proprietor of an estate to sell him a right of access to it for an equitable price. L. 13, § 1, D. (viii. 3). L. 2, D. (xx. 5). L. 15, C. (viii. 18). L. 7, D. (xi. 7). L. 12, D. (xi. 7).

Assuming the contract to be duly made, the rights and duties arising out of it for the seller and the purchaser severally were as follows. These rights and duties were necessarily so far intertwined for the two parties, that the buyer's and the seller's interests are best considered together. Except in case that instant possession was given, or part of the price was paid on the spot, or security or special personal credit was given for the rest, the effect of the sale was, not to transfer the ownership of the thing sold, but to render the seller liable to do all that in him lay to transfer the ownership at a future time. Any number, and almost any variety, of subsidiary engagements might be made with respect to the time at which possession was to be given, and as to the care of the thing sold in the interval. Apart from any such qualifying engagement, the thing sold remained, after the sale, in the possession of the seller till the price was paid, or offer of payment was made, at which time the seller was bound to transfer possession to the buyer. Before this time the thing was at the risk of the buyer, and after it at that of the seller. Even if the thing were acci- L. 19, D. (xviii. 1).

dentally stolen, lost, or destroyed while at the buyer's risk, he was none the less liable to pay the price, but the seller had to pass to the buyer any rights of action he might have for making the loss good.

If the thing sold received any accession between the time of sale and that of delivery, the buyer had the benefit of it. If the things sold were only determined by number and weight, the sale was not completed till the amount was ascertained. If things not individually determined were sold for a price in block (*per aversionem*), the sale was completed at once, and the seller was responsible for taking ordinary care that the proper quantity sold should be forthcoming at the time of delivery. The risk, otherwise, from the moment of sale, was the buyer's.

Paul. (ii. 17).

L. 35, § 5, D. (xviii. 1).

It was seen above that, according to the later law, every contract of sale was held to carry with it a presumed engagement to make good to the buyer the value of the thing, in case he were dispossessed through a claimant with a title superior to that of the seller. Before this presumption had become invariably attached by law, it was the custom to supplement the contract of sale by a subsidiary stipulation for a payment of double the price to the buyer in case of eviction.

Paul. Sent. (ii. 17). L. 66, D. (xviii. 1). L. 1, D. (xxi. 2).

Eviction implied every kind of dispossession by a judicial process, whether based on a proprietary or merely possessory claim, and whether to the whole or only to part of the thing, or to the whole or only to part of the rights purporting to be conveyed. Thus the discovery and judicial assertion of a servitude or hypothecary charge would amount to eviction.

If the price were not yet paid and eviction seemed imminent, the buyer might withhold the price unless security were given.

L. 24, C. (viii. 45). Vat. fr. 12.

In case the eviction was accomplished, the seller was liable not only to make good the value of the thing or the rights purporting to be conveyed as estimated at the time of the dispossession, but all fruits and improve-

ments calculated from the time of the sale, subject to the limit that the aggregate sum to be paid to the buyer did not exceed double the price agreed to be paid. L. 44, D. (xix. 1). L. 1, C. (vii. 47).

The seller was held to give an implicit guarantee against the existence in the thing sold of all hidden faults or defects, which diminished to an appreciable extent its usefulness for the purpose for which it might be presumed the buyer required it. It was the custom, indeed, to make a supplementary stipulation for the payment by the seller of double the price in the event of serious flaws discovering themselves or the thing sold turning out not to possess the qualities specially guaranteed. Through the operation, however, and analogical extension of the Ædilitian edict, the principle of implied guarantee was constantly affirmed and made to reach to every kind of defect, of which either the seller was aware or might, by the use of ordinary care, have made himself aware. On the other hand, the buyer must not have been aware of the defects, or they must be of a kind of which the buyer could not have made himself aware by the use of ordinary care. Of course, even where all these conditions were not satisfied, the seller was liable for his express assertions and allegations other than the customary commendations of the thing sold, the trustworthiness of which could be tested on the spot. D. (xxi. 1). L. 4, C. (iv. 58). L. 43, D. (xviii. 1). L. 37, D. (iv. 3).

There were two remedies for loss incurred through defective quality. One remedy was a rescission of the contract, brought about within six months of the sale by an action called *redhibitoria.* The purpose of this action was to replace both parties in the position they occupied before the sale—the buyer restoring the thing sold with its fruits and accessions, and the seller restoring the price with interest. If, on the action being brought, it appeared that the seller had refused both to restore the price and the interest, and to relieve the buyer from all his obligations, he was liable to pay double damages.

The other remedy was by the action *quanti minoris* or

æstimatoria. It could be resorted to within a year of the sale; and the object of it was to recover from the seller the difference between the price paid and the proved diminished value of the thing sold, owing to its hidden defects, all of which might not discover themselves at once. Thus there might be occasion for bringing this action more than once.

L. 31, § 16, D. (xxi. 1).

The right to these remedial actions might be excluded or qualified by special subsidiary agreements, or, on the other hand,—as by the *stipulatio dupli*,—the right might be extended and further defined.

There was one further remedial right of which the seller might avail himself. In case it proved that the thing had been sold for less than half its value, the seller could demand relief. It seems that this relief could be accorded not only by abrogating the sale, but by compelling the buyer to pay the residue of the price so that it amounted to at least half the value. This sort of relief was inapplicable to all sales of future and indefinite interests, and could not be had for mere proved inadequacy of price.

L. 2, 8, C. (iv. 44).

Besides the engagements which had gradually come to be regarded as essential constituents of the contract of sale and judicially presumed in all cases, it was customary to make certain informal engagements by mere common understanding, which the Prætor gradually recognized as of binding efficacy between the parties. These were "pacts," and the fuller consideration of their nature belongs to a later head. The class of pacts, however, which were allowed to supplement and qualify the contract of sale will most suitably be enumerated here before the whole subject of the contract of sale is dismissed.

These informal but binding subsidiary engagements were:—

1. An engagement for a re-sale within a certain time, at the same or some other price, fixed or not.

2. An engagement that if the buyer re-sells, the seller shall have the preference over other

L. 12, D. (xix. 5). L. 7, C. (iv. 54).

would-be purchasers, if he offers as good terms as they. This engagement is only a qualification of the last one, and has been called *pactum protimeseos.*

3. An engagement that if certain conditions are not fulfilled on either side, by a certain date, the contract of sale should be rescinded. The conditions so imported were called *lex commissoria.* In case of doubt, it was presumed that the sale was valid till the invalidating condition happened. If the sale had to be rescinded, the fruits and accessions had to be restored to the seller, and the parties, as far as possible, restored to the situation they would have occupied but for the sale. D. (xviii. 3). L. 4, C. (iv. 54).

4. An engagement that if better terms than the buyer's are offered to the seller before a certain day, he shall have a right to re-sell the thing to the person offering them (*in diem addictio*). It was a matter merely of interpretation whether the sale was regarded as completed, but subject to rescission afterwards in the event of better terms (*melior conditio*) being forthcoming, or whether the sale was only conditional at the outset. L. 2, D. (xviii. 2).

5. An engagement by which the seller reserved to himself an hypothecary charge. L. 1, § 4, D. (xxvii. 9).

6. An engagement that the buyer should be restricted in some directions, with respect to the use he should make of the thing purchased; as, for instance, that he should not sell it again, or not sell it to a particular person, or not construct a tomb upon it, or otherwise withdraw it from public commerce. This sort of contract was largely extended by Justinian, and it may be said that the later policy was generally to extend the latitude allowed to the contract of sale in every direction. C. (iv. 54).

7. Lastly, an engagement might accompany the contract of sale to the effect that the sale should hereafter be invalidated on the mere ground of the things sold not giving satisfaction. If in an engagement of this sort no specified time was mentioned, a period of sixty days only was presumed for the buyer finally to make up his mind.

But it might be expressly arranged that the buyer might revoke the sale at any time, however distant. Of course, in this case, the acquired rights of third persons could not be affected, and the remedies could be only personal as between the parties to the engagement. This sort of engagement was, in fact, wholly alien to the true nature and genius of the contract of sale.

L. 31, § 22, D. (xxi. 1).

Most of these engagements or pacts could be enforced by an ordinary action, arising out of the facts of the sale (*ex empto*, or *ex vendito*). In other cases the more general action suitable to a case in which the circumstances did not fall under a recognized type (*ex præscriptis verbis*) was serviceable.

(β) Letting and Hiring.

The contract of letting and hiring in many respects resembled the contract of sale. It was completed and signified by the mere fact of the agreement itself. It extended to all kinds of material objects, and personal services, or even interests, which could be parted with temporarily to another in return for specified payments, usually made at periodic intervals. The most important division which this class of contracts admitted of was based upon the nature of the subject-matter; that is, upon whether the things let out to be used by another person were strictly material objects, as farms, houses, and the various articles comprised in them, or were personal services. In the case of personal services, the common diction underwent a peculiar change—the person who let out the services (*locator operis*) being not the servant, but the employer, the person who hired the work (*redemptor* or *conductor*) being a contractor, in the modern sense, who secured workmen, or did the work himself.

A subordinate though practically important distinction separated the cases of a person letting a house in a town and letting a country farm. The latter, whose tenant was called *colonus*, might either let out his estate for a fixed rent (*pecunia numerata*), or might make some special

partnership with his tenant, in which case the latter was called *colonus partiarius*. The latter institution was probably the origin of the modern Metayer tenancies. L. 25, § 6, D. (xix. 2).

Apart from any special and qualifying contract, so soon as the contract was completed the landlord was held liable to put the tenant in effectual possession of the house, land, or thing rented, and to secure the hirer or tenant in the free, uninterrupted, and undisputed continuance of possession. He was bound to maintain the property or thing in good repair, to make good all dilapidations, or to reimburse the tenant for all necessary expenses towards this end. He was liable even to make good to his tenant the consequences of inevitable disasters against which he could not have provided, such as those brought about by sudden floods, earthquakes, fires, storms, or human violence. But the landlord was not further liable in this case to make good any indirect damages or to do more than suffer a proportionate diminution of the rent. On the other hand, the tenant could only be released from the rent or from a proportion of it when he experienced a very considerable accidental loss in the proceeds of the estate, for which he was in no way personally accountable; in fact, this loss must be of a kind which seemed to be out of human control (*vis divina*). In estimating the claims of the tenant to remission of rent, the deduction had to be made at the end of the lease, so that the proceeds of good years might be set against those of bad. L. 15, § 2, D. (xix. 2). L. 25, § 6, D. (xix. 1).

It will stand to reason, from what is said above, that the landlord was held to guarantee the tenant against eviction, or in case of eviction for which he was not personally responsible, to replace the thing hired by another equally serviceable.

The tenant was entitled to make every reasonable use of the thing hired and to sublet it to another. At the end of the lease he was bound to restore it in the condition he received it, subject to losses brought about by the natural effects of time or by superior force. He was bound to

exhibit the utmost diligence, and was only exempt from responsibility in the case of pure accident to which he had in no way contributed. If special implements had been let to him with the estate for its proper cultivation, he was bound absolutely to restore them or their equivalents at the end of the lease. This liability extended to slaves attached to the soil (*servus adscriptus*). Here, again, we have the first lineaments of the institution of the Middle Age villenage.

L. 3, 54, D. (xix. 2).

The landlord was held to have a general hypothecary charge on all the movable property brought by the tenant on to the estate for the purpose of cultivating it (*invecta illata*). The tenant, on the other hand, could apply for an interdict against the landlord, if the latter placed any impediment on his taking his own property away with him after he had satisfied all his obligations (*interdictum de migrando*).

L. 4, D. (xiv. 2).

D. (xliii. 32).

The landlord could, in a certain limited number of cases, require the lease to be cancelled; as where the tenant had not paid rent for two years, or grossly misused the property, or even let it suffer through neglect to use it at all, or involved the landlord in risks through non-payment of taxes; or where the landlord needed a house rented in order to inhabit it himself, or in order to carry out essential repairs. The tenant could demand rescission of the contract before the expiration of the term if, owing to the act or negligence of the landlord, he encountered any considerable interruption in his enjoyment. This included the case of windows becoming darkened through a neighbour's structures, or the property going out of repair through the landlord's neglect. The tenant was also entitled to surrender his lease if, owing to some external cause, such as the encampment of an army, or the ruinous condition of a neighbour's buildings, he was unable any longer safely to remain on the premises.

Nov. cxx. C. (i. 8).

L. 10, D. (xxxix. 4).

L. 3, C. (iv. 65).

L. 25, § 2, D. (xix. 2).

The ordinary term for the leasing of a landed estate was five years, and the same term is mentioned as in use

for the letting of houses. When the lease came to an end, it could be renewed tacitly through the tenant continuing in occupation. In this case it was presumed that there was a fresh lease on the terms of the original one. It seems that a difference existed between the cases of town and country lettings. In the case of buildings in towns it was presumed that the fresh letting was at will on both sides, and could be put an end to when either party chose. In the case of farms and buildings in the country, the letting at least endured for a year from the end of the time previously agreed upon.

L. 24, § 2, D. (xix. 2).

The benefit and liability of a lease passed to the heirs of both parties, but not to other persons into whose hands the property passed by good legal titles; though, of course, in case the tenant suffered through a change of ownership, he had personal remedies against the landlord, to whom also he continued bound to observe his own obligations.

In the case of letting and hiring of personal services (*locatio conductio operarum*), a distinction was drawn between the sort of tasks which were supposed to be of so honourable a nature as to be discharged without a salary (*operæ liberales*), and other tasks, for which an ordinary market price was commonly expected. The former seem to have comprised all those quasi-professional occupations for which a superior education was required, and reached from the humbler class of dentists, aurists, occulists, accoucheurs, librarians, notaries, land surveyors, and all practitioners of medicine concerned with any special part of the body, up to teachers of rhetoric, of philosophy, or of law. But here, again, a fresh distinction was introduced, inasmuch as the latter class of professors, of what are now called the liberal arts *par excellence*, were, for some purposes, treated apart from the rest, and were held to be dishonoured if they put themselves forward to seek or sue for remuneration, but not to be dishonoured by receiving it. For the rest of those occupied with the class of liberal pursuits above enumerated, a special method of

L. 26, D. (xxxviii. 1). L. 1, D. (l. 13).

procuring the payment of their salary was provided. The president of the province was empowered to administer summary jurisdiction in their favour by what was called an *extraordinaria cognitio.* The other tasks, payment for which was recoverable by an ordinary action at law founded on a contract of letting and hiring, were those concerned with the familiar and necessary industrial occupations of society, though it is obvious that the line between the different classes of remunerated tasks must have been a very indistinct one.

The main peculiarity in the contract for the letting and hiring of personal services related to the point as to where the risk lay in the case of materials being furnished by an employer for work to be performed upon them. The ordinary rule was that the hirer of work to be done was responsible for exhibiting the utmost amount of diligence, and it was only unavoidable accident that could excuse him from this liability. Thus, in case of goods being shipped to be carried along a certain river, and the ship which last received them being lost with all its lading, the liability was said to depend upon whether the owner of the goods had or had not directed an intermediate transhipment, or whether he had interfered at all in prescribing the time and manner of sailing. If the shipmaster had the goods entirely in his control he was responsible for the minutest want of proper diligence.

L. 13, § 1, D. (xix. 2).

If, on the other hand, the execution of the contract became impossible through facts over which the workman had no control, he not only was exempt from all liability, but could exact the full price of the labour he had been engaged to perform. On this principle professional advocates could not be compelled to restore fees if, through any cause over which they had no control, they had been unable to appear in court.

L. 38, D. (xix. 2).

L. 1, § 13, D. (l. 13).

In order to simplify the application of the above rules to actual facts, a presumption was raised that if materials to be wrought upon perished before they had been received

back and approved by the employer, it was owing to the fault of the employed; and that if they perished subsequently, it was owing to the neglect of the employer. Proof to the contrary might in either case be admitted, and special engagements might qualify the general presumption. If the master hesitated to decide on the value of the work done he could be compelled to refer it to an impartial arbitrator. L. 24, D. (xix. 2).

(γ) Mandate or Agency (*Mandatum*).

In a complicated industrial and commercial society, such as that of Rome at almost all times in its history, the contract of mandate,—by which a person committed to another the charge of some business to be managed on his account,—necessarily occupied a considerable field. The contract of mandate, which covers a large part of, but is not co-extensive with, the modern contract of agency, had two leading characteristics. One was that the person entrusted with the charge must not be induced solely by a money consideration to take it upon him. In other words, the contract was said to be a gratuitous one. This did not, however, exclude the principle that this class of contract included cases where a friendly or honourable payment was made for services of the nature of agency, such as acting as an intermediary in sales and the negotiations of commercial enterprises (*proxenetica*), and the cases already included in the last head of professional salaries for the higher sort of representative services. L. 1, § 4, D. (xvii. 1). D. (l. 14).

The other characteristic was that the service to be rendered was to be for the benefit of the person who imposed the charge, though it often necessarily was for the benefit of other persons as well, and more particularly for that of the person who undertook the charge. The word "benefit" here includes the satisfaction of natural sentiments or emotions, as the desire to emancipate a slave, or to discharge a debt of gratitude.

The agency contemplated might relate either to a par-

ticular business, or to all the concerns or the property of the person—that is, the "principal"—trusting the agent, in which latter case the agent was called *Procurator omnium bonorum.* The contract of mandate was largely resorted to for a case which might seem, on the face of it, to be inconsistent with its nature, so far as the direct interest of the principal was concerned. By what has been called a qualified mandate (*mandatum qualificatum*), a person induced another to repose credit in a third person, and to that extent the principal became a sort of surety. The difference between this and an ordinary contract of suretyship was that the former was not an accessory agreement, and payment by the person so rendering himself liable did not discharge the debtor on whose behalf the liability was incurred. The creditor might also be compelled to transfer his right of actions against the debtor to the person who interposed.

L. 12, D. (ii. 14). L. 1, D. (iii. 3).

L. 27, § 5, D. (xvii. 1). L. 6, § 4, D. (xvii. 1).

It was generally assumed in the contract of mandate that the agent could substitute another to do the task he had undertaken, and had a corresponding right of action against his deputy; but, of course, he continued to be directly responsible to his own principal. He was responsible for all the consequences which might ensue from exceeding the limits of his trust, and within those limits was liable for the slightest want of diligence. If he received money for the purpose of his trust, he was bound to restore it at the time agreed upon, or to pay interest, and if he had placed it out at interest without authorization he was bound to refund his profits.

On the other hand, the principal was held liable to make good the expenses and disbursements of the agent; he was even liable when the amount exceeded what was strictly necessary for the purpose in hand. He was further liable to recoup the agent for interest he had to pay on loans contracted for the purpose of executing the commission, and to indemnify him for unavoidable losses. The principal was liable for every kind of failure of diligence and care

L. 27, § 4, D. (xvii. 1).

2 Paul, Sen. ii. 15.

which entailed loss on the agent. This might be a relevant consideration where the principal required the agent to employ a person of bad character, through whose acts the agent incurred loss. L. 26, § 7. D (xvii. 1). L. 61, § 5, D. (xlvii. 2).

An important part of the law of mandate was concerned with the relation of third persons towards the principal and the agent respectively. The general principle was of course clear that no private engagement between two persons could affect others who were not cognizant of it, but a rigid application of this principle led to practical inconvenience, through imposing the necessity of two actions in all cases in which three persons held themselves prejudiced by the acts of agents, or were rendered liable to them. One rather circuitous remedy was found by the agent transferring to the third person his own rights of action against the principal; but a more direct remedy was in course of time provided by allowing the principal and the third person who had had relations with the agent mutually to sue each other directly by what was called an *actio utilis*. L. 31, D. (iii. 5). L. 28, D. (iii. 3).

The necessity of transferring rights of action where the matter was not one of an obligation incurred by the agent, but of some real right acquired or involved, was avoided by a special enactment of Justinian's, which allowed the principal and the third person to sue each other directly in all such cases by use of either the common action of *condictio* or the special actions appropriate to hypothecary claims. L. 2, C. (iv. 27).

Apart from this legislation and from the previous practice of transferring rights of action or "cession," it was a stringent principle that no "real," not even a mere possessory, right could be acquired by the mediation of a free person.

Finally, the rights of the principal and the agent, as against each other, were rendered available by recourse to the *actio mandati directa* against the agent and the corresponding *actio contraria* against the principal. The principal could revoke the commission whenever he chose,

but of course not so as to prejudice the claims of third persons. The agent could equally retire from the trust at his pleasure, provided he did not chose for the purpose a moment specially unfavourable for the principal. But even in this last case sudden and imperious necessity might justify the agent in instantly renouncing the trust.

Paul. Sen. ii. 15.

(δ) Partnership.

The contract of partnership is best understood by treating it as a contract of reciprocal agency. It was created by the mere consent of the parties, which might be given tacitly or judicially implied from their conduct in their relations with each other or with other persons. It was essential that there should be some distinct and common aim as the purpose of the partnership; but this aim might be of a very complex kind, as in the case of the partnership known as *universorum bonorum*, where persons threw all their property into one common fund, and consented to undertake all their enterprises of whatever kind in common.

The aim of a partnership was not necessarily industrial or commercial, and it was not essential that all the partners should make contributions to the common stock in money. It was presumed, indeed, that every one made an appreciable contribution, but this might be estimated in labour, skill, material, implements, immovable plant, or even personal influence of a recognizable kind. It was regarded as essential that all the partners should receive some share of the profits; if any partner were excluded, the partnership was invalid, being designated in that case a "Leonine" partnership.

L. 29, § 2, D. (xvii. 2).

But the relation of each partner's share in the profits to his contributions was of no consequence to the validity of the contract. This was a matter upon which only those interested could pronounce an opinion, inasmuch as personal qualities have no common scale of measurement. It was decided by Justinian that a partnership might be created

conditionally, if the terms of the contract did not limit the range of operations, especially in the case of a partnership extending to the whole property of the partners. It was presumed that all industrial gains were contemplated, but these only; thus there were excluded from the account the liabilities of the partners at the time of making the contract, and the private acquisitions of the partners through gifts, legacies, or inheritances, at any time subsequently.

With respect to the conduct of a common undertaking, each partner was entitled to act independently, provided he conformed his action to the aim of the partnership; but each partner retained a right of absolute veto on the acts of any of the others not distinctly contemplated by the nature of the common purpose in view, and not belonging to the partner's private affairs. L. 28, D. (x. 3).

Each partner was held liable to give a rigid account of his acts and negociations, and to remit to the partnership fund (*communicare*) all his gains and receipts. On the other hand, he was entitled to recover from the common stock the amount of advances made by himself in furtherance of the common aim, together with interest; to be indemnified for personal losses incurred; and to be released from all obligations incidentally contracted by himself in his private capacity, for the common good.

The partners were responsible for the omission of at least that amount of diligence which people usually give to their own affairs; and they were required to pay interest for money which they were behind-hand in refunding or paying in to the firm, as well as for money from the common stock improperly expended. L. 1, § 1, D. (xxii. 1). L. 67, D. (xvii. 2).

In all the relations between the partnership firm and its members severally, loss which could not have been provided against, was always held ground for a liberation from specific engagements on either side.

It was important to ascertain the relations of the firm towards outside persons, and inasmuch as a partnership

did not constitute a legal person unless it was incorporated by the State as a *collegium*, the only principles applicable for determining the responsibility of acts done were those of mandate; the partner who acted on behalf of his co-partners being presumed to be charged with a commission for this purpose. The principles of mandate might be extended or modified by the principles applicable in the case of a person voluntarily interfering with another person's affairs, which occasioned the quasi-contract called *negotiorum gestio*, or by the principles of subsequent ratification of an act done by one person on another person's behalf, or by those of the action at law which lay in the case of one person being enriched through another's acts (*actio de in rem verso*).

Where the partners ostensibly contracted with a third person in their aggregate capacity, they incurred, in fact, a "correal" obligation, and were creditors or debtors, and, as respects the outside person, the rights and duties were equally distributable among the partners.

L. 37, D. (xlv. 3).

A partnership was terminated either spontaneously by the partners themselves, or involuntarily by outward events. The outward events which brought a partnership to an end were such as the death of one of the partners, unless it had been specially agreed that the partnership should continue, notwithstanding the occurrence of such an event. But a partnership could not be constituted for a longer period than the lifetime of all the partners, nor continue in favour of the heir of one of the partners. If in case of the death of a partner, not provided for by the terms of the partnership, the operations of the partnership still went on, it was presumed to be a new partnership.

L. 65, § 9, D. (xvii. 2).

L. 1, D. (xvii. 2).

The partnership was also involuntarily terminated by the bankruptcy of one of the partners, or by his civil death; as also obviously by the occurrence of any cause which rendered the further operations of the firm impossible. The disappearance of property or the enactment of a prohibitive law are specimens of such causes. If the

property which had disappeared were not sufficient in amount to impair the whole operations of the partnership, it might yet continue, provided the property remaining were not exclusively owned by one of the partners.

The acts or events of a spontaneous kind which brought a partnership to a close were either those contemplated by the terms of the agreement,—such as the completion of the operations in pursuit of which it was constructed; or the expiration of time; or the common consent of the partners to break up the arrangement. But renunciation at any moment by any one or more of the partners was at all times of itself sufficient at any rate to liberate him or them from the contract; and no partnership contract could be made in defiance of this principle. But it must be understood that the retiring partner was dealing *bonâ fide*, and was not selecting for his retirement a moment specially unfavourable to the operations of the firm. In this last case it was said that he freed his partners from himself, but not himself from them.

L. 5, C. (iii. 37). L. 65, § 3, D. (xvii. 2).

A partnership might indeed be constituted on the terms that the common property should not be distributed within a certain time; but even in this case a partner might be allowed to retire from the partnership and withdraw his property at an earlier date, if he were able to establish that another partner was acting in a way injurious to the common interests, or that he himself was obliged to absent himself on public business of State and against his will in circumstances in which it was not possible to nominate a substitute.

The appropriate action by which partners asserted their partnership claims against each other was the *actio pro socio*. It involved the consequences of public infamy if a fraud were disclosed, and the defendant was ordinarily bound only to make good damages to the amount that he could afford, without a loss disproportionate to his general circumstances and which might bring him to want (*in quantum facere potest*). If the result of the action or other events led to a termination of the

L. 173, D. (l. 17).

partnership, there might be required a further process for distributing the assets, for which the *actio communi dividundo* would be available.

L. 1, D. (x. 3).

In distributing the common stock and assets at the close of the partnership, the same class of difficulties naturally presented itself as those which are familiar at the present day. It had to be decided whether the property to be distributed included or not the contributions of the partners, or whether the contributions had first to be considered withdrawn before the profits and loss were estimated. Where the terms of the original agreement were precise and explicit, or where each partner had contributed an equal amount of ascertained money value, no difficulty presented itself; but the difficulty was at once apparent when, in default of special stipulation with respect to the mode of final distribution, one or more of the partners contributed, say, an annual income or occasional amounts of property of a perishable or consumable kind, or merely industry or skill, not reduced to a liquidated value.

The question was in fact one of interpretation, the presumption being that, in case of perishable goods, or available skill, the one and the other were intended to be merged in the partnership stock, as the material for the joint operations. In the case of immovable property, and perhaps of principal sums placed out at interest for the benefit of the firm, or even of annual contributions of a periodic sort admitting of being capitalized, the mere fact of an impossibility of finding a common measure between them and the mental or moral contributions of another partner might itself form a presumption that all that was contributed by any of the partners was intended to go into the common stock.

The principles above laid down are sufficiently wide to cover the case of a partnership extending to the whole property of the partners (*universorum bonorum*). In this case, it needed no special act of transfer of the private property of the partners to create the partnership stock, and all the property, present and future, of the partners

became a joint fund available to pay the separate and private debts of the partners, and to provide for their private necessities. But this did not extend to make good the liabilities of partners for civil offences (*delict*), unless the firm drew some advantage from the commission of the offence, in which case the offender might call upon his partners to contribute to pay the damages or fine.

The Contract of Emphyteusis (*Contractus emphyteuticarius*).

The peculiar sort of interest in land called *emphyteusis* has been already described in enumerating rights of ownership. It was seen to be a right something short of full ownership and yet higher than that of mere protected possession. The occupier of land by right of *emphyteusis*, or of buildings by the corresponding right of *superficies*, was entitled to retain possession always and against the whole world and under all circumstances, on one single condition—the regular payment of rent (*pensio*). It was doubted, reasonably enough, whether the contract which created this tenure was a contract of sale or a contract of letting and hiring. It was decisively settled by the Emperor Zeno, with the final acquiescence of Justinian, that the contract of *emphyteusis* could be ranged with neither one nor the other of the above-mentioned contracts, but had a special character of its own. It was also determined that, in default of express agreement between the parties, where the property was lost, or suffered some disastrous calamity which impaired its usefulness, if this loss were total the owner suffered, and if partial, the tenant.

L. 1–4, C. (iv. 66), § 3, J. (iii. 24).

(*e*) Formal Agreements Signified by Nothing else than some Act or Acts occasioning Reciprocity of Expectation (*Actio de prescriptis verbis*).

It was found by experience that the latitude of extension given to formal contracts by the recognition of the

real contracts, in which partial execution took place at, or before, the time of making the contract (*do ut des*), and by the formation of the class of consensual contracts, still failed to meet the exigencies of industrial and social life. A new class of formal contracts had yet to be created, which seemed stamped with no other mark than that of seeming to call for judicial support on purely equitable grounds. The facts could not be made exactly to fall into any of the recognized grooves. The loose principle on which the new class was constructed is openly confessed by the Roman lawyers themselves, and no secret is made of the anomaly of the remedy for defective classification.

Ulpian says openly that the new class, for which an action lay called *de prescriptis verbis*, and which was founded on a mere statement of the facts of the case, "is founded in nature itself." He says it is natural that there should be more matters of business than there are words to express them. Celsus says that recourse is had to the action in question wherever the familiar and customary names of actions are wanting. Papinian says that "it sometimes happens that the judicial and common processes and actions failing of their purpose, and not having any name appropriated to the process we require, we readily betake ourselves (*facile descendimus*) to actions founded on the facts of the case (*in factum*)." The instance is given of one who hands a thing to another simply for the purpose of ascertaining the price he will give for it; in such a case there could be no action, either of deposit or of loan. So if one gives another a definite sum to manumit a slave, and he fails to do it, the action would be *prescriptis verbis*, with a view to either the return of the money paid, or a repayment of at least the liquidated value of the interest which the person who paid it may be held to have had in the slave's manumission.

L. 4, D. (xix. 5).

L. 1, 2, D. (xix. 5).

From the principles above laid down, and the instances given, it appears at once that this class of contracts was signified only by the fact of the creation of legitimate expectations, and that no restrictions were put upon the

quality or subject-matter of the expectations which might be raised. Indeed, the liability originated would be, at the least, co-extensive with the large class of liabilities in English law falling under the head of money had and received to another person's use, if the latter class did not also comprise the cases in Roman law, covered by quasi-contracts, in which there was no original agreement at all, though it was judicially convenient to imagine one.

(2) Pacts, or Informal Agreements.

There is no way of designating the important class of "Informal Agreements" which, in the progress of Roman law, were for all purposes put upon a par with formal agreements, except by saying that, like consensual agreements, they require no specific form or ceremonial, whether constitutive or evidentiary, and that the list is a purely arbitrary one, of which the contents can only be known by being distinctly enumerated.

Pacts fell under three heads, a division due partly to historical and partly to juridical considerations. They either (1) were subsidiary to other contracts (*adjecta*), or (2) owed their force to special statutory enactments (*legitima*), or (3) were specially introduced for judicial purposes by the Prætor in the exercise of his jurisdiction (*prætoria*).

(1) The subsidiary pacts were mainly in use for the purpose of qualifying a contract of sale, and the chief of them have already been enumerated in that relation.

(2) The pacts owing their force to statutory enactments are not very numerous. They relate to such matters as the allowance of interest in certain cases, the promise of a dower, agreements to refer matters to arbitration, and, under Justinian especially, mere promises of a future gratuitous present. In the last case, however, where the sum exceeded five hundred solidi, public registration was needed. The legislation in respect to donations dated back to the Cincian law, B.C. 204.

L. 6, D. (ii. 14).

C. (viii. 54). § 2, J. (ii. 7).

(3) The prætorian pacts have been differently enumerated by different modern writers, and there is, no doubt

a difficulty in making up the list, because any obligation judicially enforced by the Prætor might be said to be based on a pact. Nevertheless, in this class there may be clearly enough discovered the pact creating an hypothecary charge (*pactum hypothecæ*), which Gaius, in the Digest, puts in the same rank with consensual contracts; the pact known as *constitutum*, by which a person formally agreed to pay on a certain day a sum already due on other grounds, and which was an extension of the engagement, habitual with bankers, giving rise to the action *receptitia* (Justinian extended the pact of *constitutum* so as to make it co-extensive in all respects with the *stipulatio*); and lastly, the customary engagement with the arbitrator between persons referring a matter in dispute to an arbitrator (*receptum arbitri*), in pursuance of which the Prætor compelled the arbitrator, in default of good reason to the contrary, to make an award.

L. 4, D. (xx. 1).

D. (xiii. 5).
C. (iv. 18).

III. Acts of Wrong Doing (*Delicta*) as giving Rise to Obligations.

The subject of acts of wrong doing has some inherent difficulties in the way of its treatment after the fashion recognized in modern systems of law, inasmuch as it included not only the topic of civil injuries to persons and property, but also a portion of what is, strictly speaking, criminal law. The attitude of the Roman mind towards criminal law was at all times a natural product of general, social, and political facts. The only acts recognized as "crimes" in the modern sense, calling for the direct interposition of the State, and for a judicial machinery appropriated to the cognizance of them, were such exceptional invasions of public security or of the general order of society as were calculated to create extraordinary alarm and immediate danger. The consequence was, that the acts in question were only gradually classed together, and passed very slowly from the direct jurisdiction of the popular political assembly, first, to a series of occasional or

permanent commissions (*quæstiones*), instituted for the purpose of adjudicating upon them as they presented themselves, and then to the emperor himself and his immediate official representatives in the provinces.

But this exceptional procedure must obviously have failed to meet the wants of a highly organized society, in the midst of which trespasses, aggressions, fraudulent and malicious interference with persons and property, must have been, at the best, of daily occurrence. The practical remedy was to extend the doctrine of civil obligations in such a way as to attach penal consequences to certain violations of them, and thereby to concentrate in the same court and process civil and criminal jurisdiction.

There were four classes of wrongful acts affecting either person or property (including under the head of property slaves), which, by Justinian's time, both gave rise to civil obligations and involved certain penal consequences of the nature either of fine or of public infamy. The wrongful acts so classified were, (1) furtive appropriation of property (*furtum*), (2) violent appropriation of property (*rapina*), (3) malicious injuries to property (*damni actio per legem Aquiliam*), and (4) malicious injuries to persons (*injuria*).

(1) Furtive Appropriation (*furtum*).

What was known as furtive appropriation included every wrongful handling of what belonged to somebody else for a fraudulent purpose. The act might reach either to the substance of the thing itself, or to its mere use or possession. The wrongfulness of the act was manifested by the concurrence of two facts—the unwillingness of the owner, and the transgressor's knowledge of that unwillingness. Thus, a creditor was held to have fraudulently appropriated a pledge if he used it for any different purpose from that for which it was committed to his charge. The instance is also given of one who has a horse entrusted to him to ride to a certain distance, and who carries it further, or into battle. It is also asserted that a fraudulent appropriation did not take place in the

case where the owner really consented, though a person who abstracted the property was not aware of his consent. But Justinian enacted that where a master encouraged his slave to act as a medium for detecting another person in the abstraction of property, and allowed the slave to carry away property for that purpose, the offender should be liable both for fraudulent appropriation and also for the corruption of the slave.

L. 20, C. (vi. 2).

The wrongful act in question was construed liberally, so as to bring within the meshes of the law all possible offenders. Thus not only a slave but also any one in another's power might be wrongfully appropriated; but one in another's power could not be liable towards the paterfamilias for an offence of this kind, though he might commit the offence so far as affected the recovery of the property and the liability of others who aided and abetted him. All aiders or abettors, or receivers of misappropriated goods knowing them to have been misappropriated, were liable equally with the direct agents; but mere advice or encouragement not accompanied by any overt act or assistance did not create liability.

A wholly anomalous and, to modern ideas, illogical difference existed in the penalty attached to wrongful appropriation when the offender was detected on the premises or before he had finally completed his offence, and when the offence was already completed or, at any rate, when the offender had for the time succeeded in interrupting the search for him. This distinction, which is in the later Roman law a pure anachronism and a relic of very early times, no doubt held its ground through an habitual distrust of the weight of judicial evidence. Even in Justinian's time the penalty was fourfold the value of the thing appropriated where the wrongful act was discovered on the spot (*furtum manifestum*), and twofold in all other cases. The value of the thing was estimated, not by the accidental interest which the owner might have in it, but at the highest value it would have had, as estimated either at the time of the theft or at the time of the judicial sentence.

The person who could sue for the penalty was not necessarily the owner, but any one whose concern in the safety of the thing was directly involved. Thus, the owner himself might be unable to sue, while the creditor or workman with whom a thing was deposited for repairs might sue. But in this last case, if the workman was at the time insolvent, and could not himself make good the value of what was entrusted to him, it was the owner who alone could sue for the penal damages.

Besides the penal action in pursuit of the aggravated damages, there were two other available actions: one for the recovery (*vindicatio*) of the thing abstracted, which could be followed up everywhere, in whosever hands it was, even in those of a possessor in good faith; the other, a personal action (*condictio furtiva*) against the person who had committed the offence or his heirs, and this last was especially serviceable where the thing was accidentally lost. Where a man and woman had been married, they could not sue each other for fraudulent acts committed during the marriage, but a special personal action was available (*actio rerum amotarum*). D. (xxv. 2).

The rights and liabilities of a penal action passed on both sides to the heirs, at least to the extent to which the heir of the transgressor had, or might be presumed to have, profited from the wrongful act. It was specially enacted that where an owner could both follow up a thing wrongfully appropriated and sue for its recovery in a penal action, and also sue in an ordinary action for a return of the thing as being lent, if he chose one course he could not change his mind and afterwards resort to the other, nor could he resort to both courses. If the owner sued a borrower, the borrower was not prevented from suing in turn a wrongful appropriator. But if after commencing his action against the borrower the owner found the thing had been wrongfully appropriated by a third person, he might then abandon his action on the loan and betake himself directly to the penal action; unless, indeed, the borrower gave the owner security for the payment of the penal damages, in which case it was

he, and not the owner himself, who had the remedy against the wrongful appropriator.

(2) VIOLENT APPROPRIATION (*Rapina, bona vi rapta*).

The general principles which governed the actionable injury of violent appropriation of another person's goods were much the same as those which applied to furtive appropriation, as already expounded. In fact, it is said that the latter injury includes the former, the essential ingredients in both, that is, the handling of what belongs to another without his consent, being common to both. The action in both cases was of a quasi-criminal kind, and within a year of the offence the person guilty of violent appropriation was liable to pay damages amounting to four times the value of the property abstracted. The amount of damages was, indeed, the same as in the case of furtive appropriation detected on the spot; only in the latter case the whole of the fourfold damages were said to be penal, in the former case only the threefold damages were penal, the single damages being in restitution of the property taken.

An action on an obligation arising from this class of injuries was only available where there was actual malicious intent (*dolus malus*). Where there was any error as to the ownership, whether founded on mistake of fact or of law, such as might happen where one who believed himself to be an owner violently rescued goods from the hands of persons he regarded as unauthorized possessors, there was a good defence to the action. But an imperial constitution was specially directed against would-be owners taking the law into their own hands, instead of referring questions of disputed ownership and possession to the proper courts. By this enactment even a real and *bonâ fide* owner who recovered his own property by acts of violence lost all further claim to it. If the property proved not to be his own, he had not only to restore the property, but, in addition, to pay its value by way of fine to the person from whom he took it.

L. 7, C. (viii. 4), § 1, J. (iv. 2).

For suing on the action arising out of violent appropriation, it was sufficient that the plaintiff should have at the time a concern in its safe custody, whether as owner or, technically, possessor, or having a mere right of servitude. Generally speaking, the same kind of interest which was necessary and sufficed in the case of furtive appropriation was required, and was sufficient, in the present case.

(3) Malicious Injuries to Property (*Damni actio per legem Aquiliam*).

Injuries of all sorts to property, including pre-eminently slaves, but not including other persons under control, were first made distinct grounds of obligatory liability by the action introduced by the Tribune Aquilius. B.C. 286. He secured the passing of a *plebiscitum*, afterwards known as the Aquilian law, the purpose of which was to provide an effective pecuniary liability for all injuries inflicted, otherwise than by unavoidable accident, on other persons' slaves, domestic animals, or goods and chattels, whether amounting to total destruction, as by causing death, or coming short of this.

There were three heads or chapters of the Aquilian law, the second of which was obsolete in Justinian's time, and the purport of which can only be made out from the corresponding passage in Gaius' Institutes.

The first head provided that if actual death were caused, the damage should be estimated by the highest value of the property in any part of the preceding year.

The second head related to an injury caused by one who had joined in a stipulation for affording security to a principal creditor, and had, without authorization, fraudulently released the creditor on receiving payment to himself. By this law he was liable to double damages if he pleaded a denial of the fact and did not make his plea good, in which way alone the action had any advantage over the usual action on a mandate.

The third head of the law extended to all the injuries

other than those causing death, as these were not included in the first head. In this head, too, a somewhat wider signification was given to the possible subject-matter of the injury. Thus, it was said that a mere voluntary adulteration of another person's wine or oil, as well as merely careless fractures, collisions, cuttings, burnings, abrasions were included. But in this head, the damages were estimated, not according to the highest value of the thing injured during the previous year, but only during the last thirty days.

The interpretation given to the wording of this law was very wide, and must have been exceedingly beneficial. It exhibited fine instances of the inimitable skill which the Roman lawyers possessed of tracking out fraud and negligence to their most obscure retreats, while at the same time making every allowance for unavoidable accident and misfortune.

Thus, a distinction is drawn between injuries to a slave casually passing, if he is near a camp (where soldiers are drilled) and is transfixed by a soldier's javelin; or he is transfixed by somebody else in the same place; or by a soldier's javelin elsewhere.

So, likewise, if a person pruning his trees kills a passing slave, it makes a difference if it was on a public highway, and he gave no notice by calling out; but no liability was held to attach if the slave was not on a public highway, or was trespassing, even though the person engaged in the pruning operations gave no notice to the passers-by.

Similarly, a surgeon who was deficient in skill, and injured a slave through a badly performed operation, or let him die through subsequent neglect, was liable under the law. On the same principle a muleteer, or a person riding or driving, was liable for accidents caused by the animals he affected to be managing, if through want of proper skill, or even the amount of personal strength which another in his place might have exerted, he rode or drove over a slave.

In inquiries as to the sort of injuries which were included in the words of the law, which described "corporeal"

assaults or accidents, it was allowed that even injuries, caused by omissions or mere indirect solicitation, brought the offender within the law. Thus, a person was liable for confining another person's slave or herd of cattle so that they died of hunger, or driving them too violently, or even for inducing a slave to go up a tree, or down a well, so that he received personal injuries. Indeed, even where a person, out of pity, set free another's slave from his fetters, so that he escaped, he was liable on an action, not based on the law itself, but on the facts as contemplated by the law (*actio in factum*).

It was, of course, open to any master of a slave who was killed by another, not only to sue for damages under the Aquilian law, but to prosecute the offender for a capital crime.

(4) MALICIOUS INJURIES TO PERSONS (*Injuria*).

A very considerable latitude was given to the interpretation of *injuria*, as affording a basis for obligation. It was said to be "everything that was not in accordance with the law;" but in a more narrow sense, sometimes insult, sometimes culpable negligence—as in the cases falling under the Aquilian law—sometimes mere unfairness or want of just dealing were included, as where a judge fails to decide with impartiality. For many of the offences properly falling under the broad class of malicious injuries, special laws had been introduced, which defined the offence, prescribed the remedial method, and awarded penal or compensatory damages. Such was the Cornelian law (probably *lex Cornelia de sicariis*), which awarded damages, to be estimated by the judge, for the offence of thrusting at another, beating him, or violating the precincts of his home. Similarly, a constitution of the Emperor Zeno made special provisions for the case of illustrious personages (*illustres viri*), as well as their relations and connections, being accused of inflicting malicious injuries on others. These persons alone were allowed to defend themselves by a procurator, without personally appearing in court.

L. 11, C. (ix. 35).

The injuries contemplated by the law included slanders, libels, and generally all assaults on reputation, as well as direct or indirect assaults affecting public decency or morals. The injury might be inflicted, not only on a person himself, but also on persons in his power, and especially on his wife and children, who, as well as the man with whom they were connected, might sue independently, but could not sue in respect of an injury inflicted upon him. An injury must be of a severer kind when inflicted on a slave than when inflicted on a wife or children, in order to bring the offenders within the law. It must openly concern the honour of his master; but a master could not sue for a mere assault on his slave's character, or for casual blows. Where a slave owned in common was injured, the damages were estimated, not by the respective shares of the master, but by their personal quality or social standing, which was supposed to be mainly affected. Where one had the usufruct in the slave and another was the owner, it was the owner who had the right of action. A person could not sue for an injury done to his free servant, unless done especially in order to insult the employer himself.

Under the XII. Tables the penal damages inflicted for this class of injuries were, for the loss of a whole limb, retaliatory amputation, but for the mere fracture of a bone, a pecuniary fine, showing, as Justinian says, "the great poverty of the ancients." In later times, the persons who could sue for the injuries assigned the damages themselves, and the judge assessed them either at this or at a less sum. In Justinian's time, the whole question of damages was reserved to the magistrate who presided over the investigation, who was required to take into account the social standing and previous reputation of the person who was supposed to be mainly affected. The virulence of an injury was estimated not only by the pain, loss, or suffering it caused, but by the place, as, for instance, if it took place in the theatre, in the market-place, or in the immediate presence of the magistrate; or by the person affected, as if he were himself a magistrate or a senator, a parent or

a patron ; or by the mere locality of a wound, as where a person's eye was the object of assault.

If an injury were once condoned, it could not be subsequently sued upon ; and not only the direct assailant, but every person viciously co-operating, however indirectly, was equally liable.

IV.—Facts analogous to Convention and to Acts of Wrong doing (*Variæ causarum figuræ, quasi-contractus, quasi-delicta*).

The acts which have already been enumerated as giving rise to obligations on the ground of agreements made, or injurious offences committed, were not found in practice sufficient to meet the exigencies which judicial experience disclosed. There were still cases in which a close analogy was observable to some of the circumstances existing in the case of actual agreements or offences ; but inasmuch as some of the most critical elements were wanting, all that could be done to bring these cases within the reach of the law of obligations was to raise fictitious presumptions, which went a great way beyond the doctrine of mere implied contracts, or imputed malice, or fraud.

Thus it might be a case in which, owing to the absence of the parties, or the fact of their having no relation to each other, the existence of a contract was impossible, and the implication of one an absurdity. Nevertheless, at a certain stage, practical justice was promoted by placing the parties in the same position towards each other in respect of rights and duties as they would have occupied had they actually contracted with each other.

One signal instance of this kind was where one person managed the affairs of another in his absence, but without either special or general mandate, or even subsequent ratification. In this case the supposition of a real contract is excluded by the hypothesis. But in such a case, actions (*negotiorum gestorum*) were held to lie on both sides in respect of the business managed, money received or ex-

pended, and obligations created. Indeed, the most scrupulous diligence in rendering accounts and managing the affairs undertaken was required. This practice was held conducive to the general advantage, inasmuch as otherwise a person's business might be irremediably damaged through his absence from home, if he had accidentally failed to make sufficient provision for a substitute.

In the same way, if two or more persons came into joint possession of some common property, as by legacy or gift, without there being a contract of partnership, in the appropriate action (*communi dividundo, familiæ erciscundæ*) each was held liable to the rest to account for products and fruits generally, and entitled to be repaid all necessary expenses he had incurred. The principle was the same in the case of co-heirs and as between heirs and legatees.

It was an extension of the principle to include in it the obligations of guardians and their wards, and the extension was the less called for as reciprocal obligations were precisely enough determined by the ordinary law. The case of a claim for a return of money paid by mistake was included in the same head of quasi-contract; but in such cases the common doctrine of an implied contract, as in the parallel English case of money had and received for the plaintiff's use, would have served all purposes equally well.

The facts included, under the name of "quasi-delicts," among those which created an obligation without implying actual fraud, malice, negligence, or indeed actual personal responsibility of any kind in the defendant, present a list which is curiously arbitrary in its form, and contains ingredients of the most opposite species. It was, in fact, an effort to extend to offences the doctrine of implied agency familiar in the case of contracts; and the composition of the list of quasi-delicts is an obvious expression of the daily experience of life in ancient Rome. In fact, this part of the law seems to have been used as a supplement to purely police arrangements.

Thus, the occupier of a house or room was liable for

the consequences of things being thrown, or liquids poured, out into the street from the windows of his dwelling-room or house. It was presumed that the culpable person, representing the householder, was liable for things being placed or suspended near a public way which might, if they fell, injure passers-by. In this case, a penalty was incurred of ten aurei (about £9). For the previously mentioned offence the penalty was double the actual damages. Where in either of these cases a man was killed, a penalty of fifty aurei (say, something under £50) was due; if he lived, but had suffered personal injuries, the judge assessed the damages, taking into account the medical expenses, and all payments required for his complete cure, as well as the value of the work which he was unable to do through his misfortune.

Where a son in his father's power lived apart from his father, the father was not liable, but only the son.

It was on the same principle that the charterer (*exercitor*) of a ship, or the landlord of a public tavern, was liable for the offences and shortcomings of those whom he employed. His heir was, however, not liable, though the heir of a person injured had a right of action (*in factum*).

By an anomalous extension of the principle, a judge who gave a partial decision, even though only moved thereto by disguised zeal or mere inattentiveness, was held to make the case his own (*litem suam facere*), and to be liable to the person who suffered to the extent which might seem proper and reasonable to the judge before whom an action against the erring judge should be tried.

CHAPTER IV.

THE FAMILY. OF THE POWER OF THE MASTER OF THE HOUSEHOLD GENERALLY (*Patria potestas*).

THE most characteristic institution of Roman law was the structure of that group of persons which was called, in the broadest sense, the family. It comprehended all the human beings—wife, children or descendants, free labourers, and slaves, who were held to be from the earliest times under the control of one head, the paterfamilias. The absoluteness or unrestricted character of this control varied greatly at different times; and by the time of Justinian little more than a shadow of it was left in the case of the wife, and the power exercisable over children and slaves was reduced to definite and very narrow limits.

It will be convenient to consider the general subject of this control exerted by the head of the household under the three heads of (1) slaves, (2) children and descendants, and (3) wife. The word power (*potestas*), in the largest sense, was used to comprise all these three descriptions of control. In a narrower sense, the word power was restricted to the control over children. As exercised over the wife, it was called *manus*, so long as that institution lasted. In the case of slaves it was called *dominium*, and we are told in the Digest that "in the person of magistrates" it was called *imperium*. Those persons who were not subject to another's control were said to be in their own right (*sui juris*); those who were so subject were said to be in somebody else's right (*alieni juris*).

L. 215, D. (l. 16).

§ 1.—*Of Slaves and Freedmen.*

By the time of Justinian, the classes of persons contemplated by the law were very much reduced in number and simplified in structure, as compared with what they had been in earlier times. In fact, strictly speaking, there were only two classes, slaves and Roman citizens, though, for some purposes, persons who had not been born free were subject to disqualifications and special liabilities.

By a law of Antoninus Pius, the previously unlimited possibilities of the cruel treatment of slaves, and especially of their murder or torture, resulting in death, were restricted, and the master was held liable to be accused of culpable homicide. Afterwards still further moderation was enforced, and if a master treated his slave with "intolerable" severity, he might be compelled to sell him for a sufficient price.

L. un. (ix. 14). J. (viii. 2).

There were certain classes of slaves who may be said to have been without a master, though, by a sort of fiction, they were held to belong either to the punishment to which they were sentenced (*servus pœnæ*), or, in the case of "public slaves," to the Roman people. The former were persons condemned for crimes to work in the State mines, though, by a Novell of Justinian, this punishment of penal servitude could not be inflicted on the class of persons somewhat loosely described as well-born. The latter were public officials, and even subordinate executive officers, such as lictors, jailors, executioners, public notaries, and registrars.

Nov. (xii. 8).

There was another class of slaves who, though legally without more rights than the lowest class, practically enjoyed a large amount of personal independence. Those were the household stewards, managers of country estates (*coloni*, *rustici*), librarians, bankers, and generally the important classes of persons who managed the whole industrial business of imperial Rome, from which the constantly decreasing number of aristocratic capitalists more and more shrank.

The control of the slave's master extended over (1) his *person* and (2) his *property*.

As to (1) the slave's *person*, the control of the master over the slave and over all the offspring of female slaves born while in his service, if no longer absolute, was at least indefinite, that is, it was unlimited in all directions in which it was not bounded by the positive imperial legislation.

As to (2) the slave's *property*, it was a very ancient practice, which persisted and indeed developed itself up to the latest period, for the master to permit to his slave the possession and use of a certain amount of private property, called—as was the analogous free grant to children—the *peculium*. In some cases this private property of the slave was a matter of considerable importance, both to the slave himself and to his master. It might, for instance, comprise all the stock-in-trade of an industrial or commercial business, and even include other subordinate slaves (*vicarii*). The right of the slave to the proceeds of his labour or successful enterprise in speculation was not, indeed, recognized by law, and the whole, both of the casual profits and of the capital, was legally included in the master's estate. But the custom of the *peculium* was so ingrained in Roman institutions, and so habitually respected, that the practical security enjoyed by the slave for the reward of his adventures and personal exertions on his own behalf was little less effectual than if it had been formally sanctioned by law.

When the possession of a *peculium* led the slave into transactions with the outer world, questions might and did arise as to how far the slave was acting solely on his own behalf or, in the character of his master's agent, was risking his master's goods, tendering his master's credit, and involving his master in responsibility to an extent perhaps exceeding the amount of the *peculium* implicated.

To meet these emergencies, and to do justice as between the master and strangers who might be unaware of the kind and amount of commission given for a particular business, or for business generally, by a master to his slave,

the Prætor introduced a series of actions. These were based upon the several sorts of agency which, both in the case of a slave and in that of any other person in the power of another, were in practice most habitually resorted to. Such actions were those known as (*a*) *Quod jussu domini*, (*b*) *Exercitoria*, (*c*) *Institoria*, (*d*) *Tributoria*, (*e*) *De peculio*, and (*f*) *De eo quod in rem domini versum erat.*

(*a*) In the action *quod jussu domini*, the fullest amount of representation was presumed or had been proved, and the master was held liable to make good whatever a contractor with the slave might reasonably have believed to be authorized by the master.

(*b* and *c*) The actions *exercitoria* and *institoria* were introduced for two special cases, which constantly presented themselves: the former being based on engagements made by a slave, or other person not in his own right, in the course of prosecuting a maritime adventure or speculation while in command of his master's ship; the latter similarly while conducting a tavern business or industrial concern. In both actions the fullest degree of representation was presumed, and the master was held liable, as it was said, *in solidum*, to make good losses in the same way as if he had personally interposed himself.

(*d*) Where a slave, with the knowledge of his master, dealt with his *peculium*, the profits of a contract so made were rendered available to repay any debt which, in their mutual negotiations, happened at the time to be due from the master to the slave, and the claims of all other creditors had to abate in due proportion. This was effected by the *tributoria* action, the right of using which was allowed to any creditor who complained that the master, who had a precedence in making the distribution, had not assessed his claim at its due value.

(*e* and *f*) The actions *de peculio* and *de eo quod in rem domini versum erat* were applicable to the cases where the possessor of the *peculium*, while dealing with it had, either in fact or by reasonable presumption, exceeded the authority of the owner or *dominus*. The master was held liable by one or other of these actions to make good the loss in-

curred by creditors, to an amount either of such a proportion of the *peculium* as was equivalent to the gain he himself had reaped by the transaction, or, if he had gained nothing, to an amount limited by the extent of the *peculium* itself. The master's gains were held, for the purposes of this calculation, to include all necessary expenses disbursed for the preservation of the property. In calculating the value of the *peculium*, all debts from its possessor to the *dominus*—its owner—had first to be deducted.

It is to be remarked that the class of agents here denoted as dealing with the *peculium* includes the slaves of others, temporarily in the possession of a strange master, and also slaves who themselves are the *peculium* of another slave.

In the time of Justinian, the modes of becoming a slave had been reduced in some directions and extended in others. The only surviving modes were (1) captivity, (2) birth, and (3) infamous punishments.

(1) By captivity not only did a prisoner of war become a slave of the State, but, when a Roman citizen was captured by the enemy, he was held to have undergone a civil death, which, for some purposes, was equivalent to a reduction to slavery. Where, indeed, the captured citizen was recovered, he at once re-entered upon all the rights of citizenship, dating back from the time at which they had been suspended (*jus postliminium*). If the citizen did not return from captivity, he was reputed to have died at the moment of his capture.

Ulp. (x. 4). L. 18, D. (xlix. 15).

(2) The general rule was that the child of every female slave, whoever was its father, was born a slave. But the severity of this rule was gradually relaxed to the extent that if the mother was free at any moment between conception and birth her child was born in a condition of freedom.

(3) By way of infamous punishment, a slave, previously enfranchised, might be reduced again to a condition of slavery on being found guilty of certain specific acts of

ingratitude towards his master. The character of some of these acts will appear when the duties of the freedman towards the patron who manumitted him have been recited. A free citizen might also be reduced to a condition of slavery if he was proved party to a fraudulent transaction which resulted in the sale of himself, as though he were a slave, on the terms that he should share in the price; in this case he could not claim his liberty. Lastly, condemnation to the mines reduced the convict to a permanent condition of slavery.

L. 7, D. (xl. 12). L. 1, C. (vii. 18).

There remains to be considered the (1) modes of liberation from slavery, that is, of "manumission;" (2) the special restrictions on manumission; and (3) the condition of a freedman or person who had been manumitted from slavery.

(1) In Justinian's time, the modes of manumission had been altered in many respects from what they were in the days of the republic and of the earlier emperors, and this is still more true of the legislative restrictions on manumission. The most noticeable change in the modes of manumission was the abolition of the mode called *censu*, by which a slave became free through a mere inscription, with his master's consent, on the census roll. The surviving or newly introduced methods were (*a*) by the formal proceeding before a magistrate, called *vindicta;* (*b*) by will or codicil; (*c*) by an informal declaration made before witnesses of repute (generally five in number, specially summoned), or by a written communication (likewise authenticated by five witnesses—*inter amicos, per epistolam*); and (*d*) by a formal proceeding, first introduced by Constantine, which was to take place before the Christian congregation assembled in Church, to which the ministers of the Church acted as witnesses, preserving a record of it in a public register.

L. 1, C. (vii. 6).

L. 1. 2, C. (i. 13).

Of these, the first and second modes are the only ones that need further notice. As to the first mode of manumission (*vindicta*, or by the stroke of a rod), which

probably recalled some ancient usage which is buried in oblivion, the proceedings, in Justinian's time, consisted of nothing else than the simplest declaration of will on the part of the master in the presence of the chief magistrate of the district.

L. 4, C. (vii. 1).

The testamentary mode of manumission might operate either by making a slave an heir, or by simply charging the heir with the duty of manumitting one or more of the slaves of the testator, or by imposing on the heir a trust to purchase the slave of another and give him his freedom. In any of these cases, the freedom might be made conditional on the happening of other events, or only to take place after a certain date. Before the accomplishment of the condition, or the lapse of the interval prescribed, the slave was said to be *statu liber*, and had a vested right to his liberty, and no remissness, nor still less fraud, on the part of the heir could rob him of his ultimate liberty. In the case of making a slave an heir, no express declaration referring to freedom was needed to effect the manumission. Where the heir was simply directed to manumit a slave on the estate, the manumission was effected of itself so soon as the testator was dead, and the heir had entered on the estate under the will. If the heir were remiss in entering, a judicial proceeding was available to secure that the manumissions were carried into effect.

L. 15, C. (vii. 2).

The slave to be manumitted might himself be allowed to enter on the inheritance, and have the estate assigned to himself on condition of giving proper security to the creditors. This might take place even where there was no will and the manumission was merely enjoined through a codicil on the heir of intestacy.

J. (iii. 11). L. 2, D. (xl. 5).

Where the manumission was effected by a trust imposed on the heir to purchase and liberate the slave of another, the heir could always be compelled by the magistrate to carry out the trust, so far as the heir was concerned. If the owner of the slave would not sell him, the manumission was deferred till an opportunity presented itself of effecting the purchase. Of course, where the slave was part of the inheritance, he

L. 4, 11, 15, C. vii. 4). 2 J. (ii. 24).

had to be manumitted at once, even at the expense of creditors of the estate.

There was this difference between freedom given by making the slave an heir or imposing on the heir a direct charge to manumit (*directa libertas*), and freedom given through the medium of a trust. In the former case, the manumitted slave became a freedman without being liable to any of the duties towards the manumitter or patron, which it will be seen shortly in many respects qualified his freedom. He was sometimes called an *orcinus*, that is, one who had his patron in the shades below. Where the manumission was by trust, the freedman had for his patron the person who, by completing the manumission, executed the trust.

(2) In Justinian's time, owing to a number of social and political causes, among which the influence of the Christian Church is not the least conspicuous, manumissions were exempted from a number of hampering restrictions which, in former times, had attended them and had been, in fact, rigidly enforced. The *lex Furia Caninia*, which had strictly limited the number of slaves capable of being manumitted by will, was abolished by Justinian; and the same emperor preserved only one of the vexatious formalities and impediments prescribed by the *lex Ælia Sentia*, that is the one which prohibited manumissions in fraud of creditors. Justinian further abolished a number of practical restrictions which had grown up through judicial decisions, such as those due to the alleged claims of the co-proprietor of a slave enfranchised by one of his masters; or to the fact that a manumitter had only the abstract ownership of a slave, but not the usufruct or only the usufruct. C. (vii. 15).

(3) The chief duties of a freedman towards his patron, or his patron's family, that is, his children and direct descendants, were (*a*) the exhibition of such loyalty and respect to them as would not permit him to bring against them an action carrying with it the punishment of infamy, or an action at all, without the permission of the magistrate. Where the manumitter was a corporation, individual

members of the corporation did not enjoy this exempting privilege; but the acting representative of the corporation could not be sued on its behalf by the freedman without the magistrates' leave. The penalty for the "ingratitude" which disobedience to these rules was held to involve was made, by Constantine, the return to the condition of slave to the offended patron. The freedman or "client" was (*b*) held bound to supply, in cases of necessity, food and the necessaries of life to the patron, and to the patron's children and parents; and, if required, to become guardian to the patron's children. On the other hand, the patron was entitled himself to assume the guardianship of his freedman, and of his freedman's children; and he had furthermore a right of succession to the property of his freedman, where the latter died intestate and left no children. Justinian, however, a good deal altered the law in this respect, and even in cases where the client left a will, recognized, where the property was large, the claims of patrons. The general rule still continued that the freedman could displace the rights of the patron and his family by making a will; but if he died intestate, these rights, originally given by the XII. Tables, survived in full force. Where the estate of the deceased freedman exceeded a hundred thousand sesterces (a little under £800 sterling, counting the *sestertium* at £7 16*s*.), the patrons had no rights as against children or descendants, where there were any. But if there were a will, and the testator left no descendants, or the testator had expressly disinherited them, or, being their mother or maternal grandfather, had omitted mention of them or, at least, not left them so small an amount as to risk the will being treated as invalid (on the ground of being *inofficiosum*, or, as will be explained in a later chapter, regardless of natural claims), in this case the patron was entitled to claim a third part of the goods of the deceased, or so much as, in addition to what was expressly left him by will, would make up the third part. In this case legacies and trusts due in respect of this third part to the children of the deceased, were not chargeable on the patron's share,

L. 2, C. (vii. 7).

L. 4, C. (vi. 4).
3 J. (iii. 7).

but solely on that of the other inheritors of the property.

The patron could furthermore exact from his client, either by simple agreement or by mere promise confirmed by oath, special engagements to render him and his family services of various kinds, and even to make him or them stated presents. A distinction was drawn between "official" services, which were held merely to testify affection and respect, and industrial services having a pecuniary value. The latter alone could be imposed in favour of the patron's personal relations. D. (xxxvii. 14, 15). D. 1, 2, 3, 4, 5).

By the special favour of the emperor, freedmen could acquire all the rights of freeborn citizens signified by the privilege of wearing the gold ring, a privilege formally conceded only to officers of State or to senators. The rights, however, of the patron could, even in this case, only be extinguished on the patron's consent being obtained, the emperor thereupon making a special grant in the freedman's favour of what was called "restitution of natal rights." By the latest legislation of Justinian, the patron could confer on his freedman the honorary rights attributed to the wearing of a gold ring by formally declaring him a Roman citizen. But still, as under the older law, the distinction remained little more than honorary, and left the claims of the patron intact. D. (xl. 10, 11). Nov. (lxxviii.).

§ 2.—*Children and Descendants.*

(1) As Regards the Person.

The power of the head of the household over his children and children's children, natural and adopted, was in many respects more complicated in character than that over his slaves, and underwent many modifications in the direction of freedom to which the other institution was a stranger. The power related either to the person of him who was the subject of it—who may be conveniently

designated here throughout as the "son," unless a daughter or grandson is specially mentioned—or to his property. According to the very earliest law of which we have any knowledge, the power of the father over his legitimate children, not adopted by another, knew no limit. The father was sole lawgiver, judge, and, if need were, executioner. There is no doubt that, up to very late days in the history of the empire, the theory that the father had the right of putting his children to death and, *a fortiori*, of punishing, and even of torturing them at his caprice, was still formally recognized. The first legislative restriction on this plenary right of the father is contained in a constitution of Valentinian and Valens (cir. 364–375), which forbade the exercise of the right of domestic chastisement beyond a limit, not very definitely described as *in immensum*, where the atrocity of an offence seemed to be inadequately reached by this domestic jurisdiction. Those guilty of an offence exceeding the bounds (*enormis delicti reos*), were to be handed over to public justice.

C. (ix. 15).

Even under Constantine, however, a constitution was made which reappears in Justinian's Code, preserving and indeed reviving with amendments the antique practice of selling children. A general principle affirmed by Diocletian was still maintained that no valid title could be given by parents on a sale, gift, pledge, or other conveyance of their children; but the law of Constantine introduced an exception in the case of new-born children, sold through want. In this case, the purchaser acquired the right to the child's services, but the vendor or the child himself, or any one else, could redeem him and reinstate him in his civil rights on offering a fitting price, or providing a slave or free labourer of equal value. Justinian finally, in alluding to the practice, once said to have existed, of a father surrendering his child,—as at all times he could surrender his slave,—to an injured person, by way of compensation for an injury inflicted by the child, repudiates it on the ground of its flagrant inhumanity and immorality, especially

2 C. (iv. 43).

7 J. (iv. 8).

in the case of daughters. He preserves the institution as affecting a slave, who was said to be given up as a *noxa.* The offence was called a *noxia,* and the action for obtaining such compensation a *noxalis actio.*

The various degrees of offence which a son might be guilty of towards his father, with the corresponding domestic penalties, seem to be marked in a law of Alexander Severus, embodied in Justinian's Code. The law seems to point to the fact that the father was expected to exert his personal influence in controlling the son's conduct with respect to property. The words are as follows: "If your son is in your power, he cannot part with property acquired from you. If he does not recognize the dutiful obligations owing to his father, there is nothing to prevent you punishing him in the exercise of your parental power. If he persists in the same contumacious conduct, you can resort to severer remedial measures. You may further take him before the president of the district, who will pronounce a sentence such as will meet your wishes." A constitution of Diocletian and Maximian further laid down that the governor of the province would compel a son not only to show his father due reverence but to supply him with the necessaries of life.

3 C. (viii. 47).

About the father's control over the son's person, and his claims to formal respect and submission, a conflict naturally presented itself in certain of the emergencies of civil life between the position of the son in his family and his position as a citizen,—and perhaps even a public official,—in the State. It was here, indeed, that the legal situation of a son was most noticeably contrasted with that of a slave. It was discussed at one time rather as a theoretical than a practical question, whether a father who was a proconsul ought to make the customary obeisance in the street on meeting his son, who was a consul; and the better opinion seemed to be that he ought. The principle was that the private relationship gave way to the public one, but only within the precisely ascertained limits to which the public relationship necessarily extended. The private relationship, again, in

Aulus Gellius, N. A. (ii. 2).

no way affected the inherent legal capacity of the son, except so far as the father's rights invaded, or, as it were, competed with, those of the son.

Originally, no doubt, before the individualizing tendencies of advancing law had rescued the son,—as also even the wife,—from the sort of legal confusion which, in earlier times, is presented by the natural family group, an identity or unity of person between the son and father was for legal purposes habitually presupposed. A shadow of this long fixed conception is preserved in such passages as the following from Paulus, embodied in the Digest. "That a father cannot sue his son for theft is not so much the result of a legal prohibition as of essential natural impediments; because we can no more sue those who are in our power than we can sue ourselves." Justinian's Code further says that "father and son are by nature almost understood to be one and the same person."

16 D. (xlvii. 2).

11 C. (vi. 26).

Savigny has aptly and succinctly described the son's legal position in reference to his father and to others. "The son lacks the capacity, in matters of private legal relationship, to exercise any power or authority, while in every other relationship his capacity is unrestricted. Furthermore, the defective capacity is not to be treated as an inherent want in the child himself, but merely as a consequence of the rule of law by which the father acquires the benefit of all the rights which spring from the son's acts." To put the matter briefly, the position of the son was only affected by the father's power for the purposes of private law but not of public. He had all the rights of civic intercourse for purposes of industry, trade, and marriage, that is, the *commercium* and *connubium*, but he could only exercise these rights under certain limitations. For instance, he could be a witness to a will, but could not make one; he could be sued for his debts, but not sue.

System des Heutigen Rechts, Buch. ii., § 67.

(2) As regards Property.

The property of the son in his father's control was either of exactly the same nature as the slave's *peculium*; or, though also called *peculium*, was, in fact, a distinctly different species of wealth, over which the son could legally exercise greater or less powers of independent management, free from his father's general influence, though not free from all present or ulterior rights of the father to co-operation in legal acts, to ownership in the principal, to usufruct of the proceeds, or to hereditary succession.

In the time of Justinian, the private property of a son in his father's power might be classed under three heads, each of which was regulated by different rules. The first head included the *peculium*, strictly so called,—a portion of the estate of the head of the household, in analogy with the slave's *peculium*, which he, of his own free will, granted to his slave or son to be temporarily managed for him. He alone could draw any advantage from the permanent increase or improvement of the principal fund.

The second head under which the son's property was comprised included that important species of private estate, which, under the names of *castrense peculium* and *quasi-castrense peculium*, had been gradually called into being by a succession of enactments of the Emperor Augustus, and had gone so far that it constituted the son an independent proprietor and entirely liberated him from the parental control.

At first, under the name of *castrense peculium*, this species of property was strictly limited to all those goods and materials of wealth in which a soldier, on entering upon a campaign, and throughout the campaign, might be supposed to have a paramount interest; thus, there would be included in such property all gifts presented by sons, father, mother, relations, or friends for the purpose of fitting him out for going to join the army. All proceeds

of the campaign, such as prize money, enemy's goods, as well as military pay, were also naturally included. Even an inheritance which fell to the soldier in consequence of his military associations, as, for instance, when left by a fellow-soldier, was included.

It was Constantine who first gave a precise legislative definition to a logical enlargement of the *castrense peculium* that had grown up in practice long before. Under Constantine and his successors, up to and including Justinian, the civil service of the State, especially that attached to the imperial court, was, for the purpose of conferring a right to independent ownership on a civil servant in his father's power, placed in exactly the same position as the military service. Another extension, confirmed by Justinian's Novells, brought the service of the church as carried on by the regular ecclesiastical ministers, duly ordained, within the same category. This logical amplification of the *castrense peculium* was called the *quasi-castrense peculium.*

Nov. (cxxiii. 19).

With respect both to the *castrense* and the *quasi-castrense peculium*, the son under his father's power had all the rights which he could have had if he were in the power of no one. He could exert all the rights of action necessary to protect it. It was liable to be resorted to for the satisfaction of his creditors, and, so far as it went, he could not benefit from the *Senatus consultum Macedonianum* forbidding advances by usurers to sons in their father's power. He could bequeath the property by will, and at his father's death he had to make no account of it in settling about the father's estate with his brothers. The only claim of the father was to administer as trustee in guardianship if the son became insane, and, on the son dying intestate without children, to inherit the property.

The third head under which the son's private property falls, and which also was called *peculium*, comprised all the wealth which the son acquired otherwise than from military, civil, or ecclesiastical service as just described, or from his

father's estate. This kind of *peculium*, which likewise seems to have been originally introduced by Constantine, included all property which came to the son from his mother, or blood relations; also all money settled on a first marriage of the son's father, when a second marriage took place; and, lastly, all property which came to the son, as it was said, by fortune's favour or by his own exertions. 6 C. (vi. 60).

With respect to all this species of *peculium*, the son enjoyed only the ownership of the principal fund, while the father had the usufruct of the income or continuing proceeds. The father had the general management of the property, but without the right of selling, pledging, or in any way burdening the estate. If the son was of full age, and not at a distance, his consent was needed in incurring expenditure for the improvement of the estate. The only cases in which the property could be alienated by the son with the father's consent were, if the property could not be otherwise preserved, when the debt of a deceased person required to be sold in order to prevent loss, or when legacies left to the son could in no other way be turned to beneficial account. The son had a tacit charge of the nature of a mortgage on his father's property for the security of this *peculium*.

The father lost his rights in this *peculium*, or never acquired any, in a few special cases: as where the son entered on an inheritance left to him because of his father's refusal to enter; when the son obtained property on the express terms that the father should gain no interest in it; or, when the parents made an unjust divorce in consequence of which the mother's property passed to the children. The son, of course, in no case had a right to make a will with respect to this property, any more than with respect to other portions of his father's estate.

It remains to be noticed that it has been customary among the Middle Ages and modern jurists to distribute the whole of the different species of property enjoyable by a son, here enumerated under three heads, into two main divisions, the *peculium paganum*, or *peculium* belonging

to civil life; and the *peculium castrense*, or that belonging to military life. The former, again, has been distributed into the *peculium profectitium* (analogous to the *dos profectitium*), which came from the father, and the *peculium adventitium*, which (similar to the analogous sort of dower) came from other friends or relations. The *peculium militare* was distributed naturally into the *castrense* and *quasi-castrence*.

(3) The Extension of the Family by Legitimation, Adoption, and Arrogation.

The peculiar institution of regulated concubinage, which was rather a deferential tribute to the antique dignity of the formal Roman marriage than a concession to libertinism, gave a special prominence at all times to the modes by which children, who had been born out of wedlock, could be brought under their father's power by legitimation. It being premised that only such children could be rendered legitimate as had for their mother a woman whose character was in no other respect assailable than because there was some legal defect or incapacity which had prevented a formal marriage, the following were, in Justinian's time, the three modes in which legitimation could be effected.

(1) By the subsequent marriage of the father and mother; (2) by presenting the child before the *curia* or senate of a provincial town; or by presenting a son to the *curia*, that is, by having him registered as willing to undertake the unpopular and burdensome function of a *decurio*, or marrying a daughter to a *decurio;* and (3) by a rescript of the emperor. Such a rescript could only be obtained on the father's express application, which, however, might be made by will. It would not be granted if the father had legitimate children living, or if, on legal and moral grounds, a marriage between the father and mother was not impossible.

The assent or ratification of the child was needed to give efficacy to the act of legitimation. The effect of the act was to put the legitimated child in all respects on

a par with the children born in wedlock, except, indeed, in the special case in which the legitimation was effected by presentation to the *curia*. In this case the child acquired no rights of succession to any other person than his father. Nov. (lxxxix. 4).

The adoption of children in the broader sense, which included that form of adoption (*arrogatio*) by which a son who was no longer under his father's power was brought under the power of a new father, fictitiously so called, was at all times a prominent feature in Roman law, and the rules regulating it vacillated very slightly during the thousand years which the true history of that law covers. Its fortunes are a proof that the Roman family was even still more a legal and political than a moral conception. The Prætor, indeed, had consistently struggled by his occasional, though increasingly steady and uniform, legislation to substitute at all points the claims of natural relations in the matter of succession for the claims of remote connections favoured by the letter of the older law. Justinian achieved the final triumph of the natural over the legal family by refusing to all adopting parents, other than a child's maternal grandfather (or paternal grandfather where the father was emancipated) or earlier ascendant, all rights of succession to the property of an adopted child, such rights being reserved for the natural parent just as if no adoption had taken place.

In former times, indeed, the severely legal conception of adoption was obtruded into prominence through the formality of the three-fold sale (*mancipatio*), by which alone the natural parent could exclude his son from his family, and prepare the way for the final conveyance of him to the adopter. In the earlier empire, however, the mere decree of the local magistrate was sufficient to transfer a son from one family to another. It was said that adoption always "imitated nature;" and on this ground, while the adopted person might be introduced into the new family either as a son, a grandson, or a great grandson, he must at least be eighteen years younger than the adopting parent. Gaius (i. 132, 134).

The adoption (*arrogatio*) of persons who were freed from their parents' control was at all times treated as a matter of more public concern than the other species of adoption, because of the rights of succession which might be involved. In earlier days the *gens*, and in imperial times the *fiscus* or State treasury, might be unwittingly deprived of their claims to succession or intestacy through an adoption of the sort known as arrogation, which in its etymology recalls the formal law of the *comitia curiata*, through which alone the proceeding could be sanctioned. The substitute for this in latter days and in Justinian's time was an imperial rescript. This was granted as of course, on application and on satisfactory reasons being given as to the transaction being *bonâ fide* and presumably advantageous to the person to be adopted. So far as Justinian had not abolished all the adopter's pecuniary claims, security had to be given to a public official (*tabularius*) that if the adopted person died before the age of puberty, his property would be restored to those who would have succeeded to it if no adoption had taken place. The adopter could only emancipate the adopted son on giving satisfactory reason for it, and surrendering all the son's property. If the new parent disinherited or emancipated him without good reason, he was bound to leave him a fourth part (*quarta Antonina*) of his estate, that is, over and above both the property which he originally brought to the adopting parent and the improvements in that property which he had effected for him.

§ 3.—*Husband and Wife.*

In the principal sources of Roman law, marriage is treated mainly as an avenue to the constitution of the *patria potestas*, and as such it occupies a most central position in the general account of legal institutions, even independently of those rights and duties of husband, wife, children, and relatives which sprang from the fact of marriage itself. Like other parts of the law regarding the

composition of the Roman household, the customary institutions as well as the rules of law underwent considerable changes at different periods, though these were brought about almost insensibly, and in this way rather reflected the progressive and silent development of social and political ideas than were the forced product of conscious policy or of revolutionary accidents.

Of the three co-operating tendencies which almost universally contribute, in different proportions at different epochs, to frame the full conception of marriage, that is, the legal, the religious, and the moral notion, it was the last of the three—the moral—which, in concert with the legal, ultimately preponderated. Yet by the time of Justinian a new religious notion, due to the gradual occupation of the whole field of civil life by the ramified organization of the Christian Church, was gradually taking the place left vacant by the antiquated but long and fondly cherished usages of heathen and, more especially, patrician Rome.

The subject will be conveniently distributed into the following divisions—

(1) The constitution of the marriage.
(2) Divorce.
(3) The wife's property.

(1) The Constitution of the Marriage.

There were three essential ideas that at all times entered into and qualified the Roman conception of marriage. It was a union between a man and a woman, presumably of life-long duration; it reached to and penetrated all the affairs of life in which it was physically or legally possible for the two parties to share; it contemplated the birth and education of children (*liberorum quærundorum causâ*, an expression which seems to have survived from some ancient marriage ritual). Modestinus says "Marriage is a union of a man and woman, by which the whole of life is partaken of in common, and all rights, human and divine, are freely inter-

L. 1, D. (xxiii. 2).

changed between them (*consortium omnis vitæ, divini et humani juris communicatio*). Ulpian says that it is not cohabitation but consent which brings about a marriage.

15 D. (xxxv. 1).

There is no doubt that at all times in the development of the law the essence of the marriage consisted in the consent of the parties. The main question was throughout as to the evidence which was to be provided of such a consent having been manifested. The religious ceremonial which the customs of early Rome introduced in attendance on marriage, and which, in the case of the patrician marriage of *confarreatio*, reached a high pitch of ritualistic precision, afforded for many centuries the best and most indisputable evidence of the existence of a true marriage. Other evidence, not less satisfactory, though less overt to the general public, was supplied by the fictitious sale or *coemptio*, which, whether ripened or not into a complete transfer of the wife from the family of her father to that of her husband by a completion of the prescriptive cohabitation for an unbroken year, at least left no doubt of the existence of a true consent in both the parties to the engagement.

Even in Gaius' time, the older usages of the *confarreatio* and the *coemptio* had become obsolete, at least as more than venerable curiosities, or than still lingering decorations of a social life fondly striving to connect itself with a far distant past. By Justinian's time, on the one hand, marriage was entirely liberated from all necessary formalities other than such as in all other cases were held to be necessary and sufficient manifestations of consent. On the other hand, either through the prevalence of Christian sentiments or a keener intuition of political expediency, a fresh impulse was given to the requirement of strict modes of proof, as bearing on the fact of the essential consent, which was the basis of marriage.

The most noticeable feature of Justinian's legislation was the institution, no doubt founded on habits existing since Constantine's time, of a sort of written marriage settlements (*instrumenta dotalia*), or, in place of them, of

attendance before the chief ecclesiastical minister (*defensor ecclesiæ*) of the district or Church. A public declaration had then and there to be made in the presence of three or four of the clergy, that on such a day of such a month, in such a year of the empire, that man and that woman had presented themselves, and were joined together as man and wife. The declaration had to be written, signed, and registered. Nov. (lxxiv. 4).

At first, Justinian enforced the making of written marriage settlements in the case of the emperor's own family, senators, and the high officers of State comprised in the class of *illustres*. Other persons of middle rank, including those attached to the military profession, the civil service, and the more honourable commercial pursuits, had to testify the fact in the way just described. By Justinian's latest legislation, however, in the 117th Novell, the only restriction imposed as affecting the evidence of consent is the requirement of a written marriage settlement in the case of the marriage of the highest officers of State. All other persons were free to marry with or without the use of written settlements, or any other formalities. Nov. (cxvii. 4).

Though, however, the consent of the parties was the essence of the constitutive act which gave rise to a marriage,—or, rather, was the marriage itself,—there were at all times certain inherent impediments which either rendered such a consent impossible or, at least, suspended its efficacy till they were removed out of the way. There were three classes of conditions which had to be satisfied before the consent of a man and woman could have the legal validity needed to constitute a marriage. There must be—

(*a*) Personal capacity.

(*b*) The consent of persons having either of the parties in their power.

(*c*) The absence of special restrictions, whether natural, as founded on blood relationship, or more or less artificial, as introduced by custom or policy (*connubium*).

(*a*) As to personal capacity, it is sufficient to notice that the conditions of marriage were almost identically the same with those demanded for the validity of all other civil acts of the highest importance, regard being had to the special character and purpose of marriage itself. Before Justinian's time, it had been doubted whether the age for making a valid marriage was definitely fixed as corresponding with the legal limits of puberty, or whether the age might vary with the conditions of individual precocity; Justinian definitely fixed the age at fourteen for males, and twelve for females. The general conditions of health are sufficiently presupposed.

(*b*) As to the consent of the persons in whose power the parties were, the general rule was that it was indispensable. By a constitution of Honorius and Theodosius, which reappeared in Justinian's Code, the principle was extended to the case of a daughter marrying under twenty-five years of age. Up to this age she needed to obtain her father's consent, if he were alive. If the father were dead, the consent of the mother and near relations was necessary. If both parents were dead, a guardian was appointed; and if a conflict arose among competing suitors, among which the woman herself, through modest sensibility (*cultu vericundiæ*), declined to make a choice, the relations were assembled, and the district magistrate had to determine, with their help, which was the most suitable among the rivals to select as a husband.

L. 2, D. (xiii. 2).

L. 20, C. (v. 4).

Where the head of the family became insane, his consent could be dispensed with; and the same was the case if he were taken prisoner by the enemy and were absent as long as three years—a period of delay which was not insisted upon when the marriage was plainly one that the head of the family would approve. If consent was refused on irrational grounds, the local magistrate was entitled to dispense with the consent, and allow the marriage.

L. 9, 19, D. (xiii. 2). L. 25, C. (v. 4).

(*c*) The rights which are gathered up in the term *connubium* were rather of a negative than a positive kind,

and consisted in the absence of restrictions which, from social and political causes, varied greatly at different periods of Roman history. At the time of Justinian, not only were the antiquated obstacles to the marriage of plebeians with patricians, and even of freedmen with citizens, almost forgotten, but the policy of favouring marriage had become so persistently recognized that no obstacles any longer prevented the marriages of foreigners with citizens. Justinian, indeed, includes in his Code a constitution of Valentinian, Theodosius, and Arcadius, forbidding the intermarriages of Christians and Jews. But he abolished all the prohibitions which had stood in the way of the marriages of senators and senators' children with freedwomen, and the marriages of persons of free birth with women who were actresses, or who otherwise belonged to conditions of life held in low repute. For administrative reasons, the restriction still prevailed which prevented the governor of a province marrying a wife selected from the residents in the province. He was said to be in the position of a guardian towards a ward, a relationship which, like that of a trustee in guardianship (*curator*), excluded at all times the possibility of marriage. This disability extended to the son and grandson of the guardian. Similarly, on moral grounds, a woman condemned for adultery could not marry her accomplice, nor could a son marry his father's concubine.

L. 63, D. (xxiii. 2).

Apart from these positive and more artificial enactments in restriction of marriage, there were certain relationships between persons, based either upon ties of blood, of marriage, or of purely civil institution, which were at all times immovable obstacles to marriage between persons connected by them.

In order to explain the obstacles to marriage which were presented through family relationships, whether springing from ties of blood, of marriage, or of artificial creation through positive law, it will be convenient in this place to enumerate the mutual relationships in the Roman family as constituted for different purposes. It will be found that

the matter is not only important as affecting the possibility of marriage (*connubium*), but as determining the right of succession on an intestacy, a subject to be treated of in the next chapter.

The Roman family was, for different purposes, regarded as constituted on two different principles, which only at a very few points coincided with each other. These principles may be severally described as based upon the civil institutions of the (1) fatherly power, or *patria potestas*, and of (2) blood relationship.

(1) The civil family had its root in the power of the existing head, who might be either a father, grandfather, or earlier progenitor—the earlier generation always continuing to hold precedence over the later, unless the representative of it had, by arrogation, submitted himself and those subject to him to the control of another, and so merged his own family in the family of his chief. The civil family, though increased and diminished by the natural events of birth and death, was likewise from time to time recruited by such purely civil and legal practices as adoption, arrogation, legitimation, and, in earlier times, the coemption of a wife, so as to bring her similarly into her husband's power, like a daughter (*in manum viri*). It was curtailed by the corresponding acts or events operating in a reverse way as well as by the mere emancipation of children, a change of family generally being noted somewhat unfavourably as a small diminution of that special status which is ranked as of pre-eminent value, or "capital" (*capitis diminutio minima*).

The relationship here indicated between the different members of the civil family group is described as *agnatio*. It is dependent wholly upon connections which, either naturally or by the effect of legal fictions and imputations, are traceable only through a male head, and so are independent of all reference to the mother or wife. In this respect *agnatio* is opposed to *cognatio*, which signified the mutual relationships of the natural family, based either upon a common blood or upon those marriage affinities which simulated a common blood, and which were trace-

able equally through the father and mother or higher male and female ascendants.

(2) The natural family which rested either upon blood or marriage (consanguinity and affinity) consisted of a variety of persons, living and dead, whose nearness to each other was estimated by reference to the nearness of each one to a common progenitor, whether male or female. For the purpose of conducting this process of comparison on well understood principles, a conventional standard was adopted in Rome, which, in spite of a rival and somewhat divergent method in use among the canonical lawyers of the Roman Church, has been generally embodied in all the systems of law in modern Europe. This standard is as follows.

Each generation is reckoned as one degree, and the distance between any two degrees is calculated by counting from the one degree up to the common ancestor, and down again from the common ancestor to the other degree. The common ancestor is only counted once, and the calculation includes one of the degrees and excludes the other. Thus, brothers are related in the second degree, an uncle and nephew in the third, first cousins in the fourth, and so on. It may be convenient to present a list of the first few degrees with some of the less familiar Latin appellatives.

1st Degree.—Father, mother, son, daughter.

2nd Degree.—Grandfather, grandmother, grandchildren, brothers, sisters.

3rd Degree.—Great-grandparents (*proavus*, *proavia*), great-grandchildren (*pronepos*, *proneptis*), uncles (father's side, *patruus;* mother's side, *avunculus*), aunts (father's side, *amita;* mother's side, *matertera*).

4th Degree.—Parents of great-grandparents (*abavus abavia*), children of great-grandchildren (*abnepos*, *abneptis*), great uncles and great aunts (*patruus magnus*, *avunculus magnus*, *amita magna*, *matertera magna*), first cousins, male and female (sons of brothers, *fratres patrueles;* sons of sisters, *consobrini;* daughters of brothers, *sorores patrueles;* daughters of sisters, *sorores amitinæ;* children of a brother and sister, *amitini*, *amitinæ*).

For convenience of reference, it is usual to call those to whom a person owes his birth, whether in the first or any previous generation, his ascendants; and those who owe their birth to him his descendants. Ascendants and descendants are said to be connected "directly" or in the "direct" line. Those related only through a brother or sister of an ascendant or descendant are said to be connected "collaterally," or in the "collateral" line. Brothers or sisters related both by the father or mother were called *germani-æ;* those having a common father only, *consanguinii-æ;* those having a common mother only, *uterini-æ.*

The impediments to marriage, founded on the relationships—civil and natural—above expounded, were as follows, it being premised, that for most purposes the limits of the civil and of the natural family were in fact co-extensive.

In the civil family, the tie of adoption as between ascendants and descendants was a perpetual obstacle to marriage, even after emancipation; as between brothers and sisters and collaterals generally, the tie of adoption was an obstacle so long only as the artificial tie continued to subsist.

1 J. (i. 10).

In the natural family, the relationship between ascendants and descendants of all degrees was an inexorable obstacle. In the collateral line, the relationship between the brother or sister of an ascendant,—*e.g.* an uncle or great uncle,—and a descendant, or (to express it in other words) the distance of only one intervening degree between one of the parties and a common ancestor, was an obstacle to marriage. Similarly in the collateral line, the distance of less than four degrees between the parties was an obstacle. This excluded the marriageability of brothers and sisters, but included that of first and remoter cousins.

The relation of affinity, that is, the connection brought about by marriage between one of the parties and the blood-relations of the other party, only operated under a constitution which first appears in the Theodosian Code, and is republished by Justinian in his Code to prevent the marriage between a husband and his deceased wife's

sister, or between a wife and her deceased husband's brother. L. 5, C. (v. 5).

The penalties of a breach of those laws which prevented marriages of what was held to be an "incestuous" kind, that is, between members of the same civil or natural family, related as above, were severe, and seem to have increased in severity with the advance of Justinian's legislative enterprises under the influence of the authorities of the Christian Church. Not only was the attempted marriage without any legal effect, but the attempt involved a series of penalties, no doubt adjusted according to the propinquity of the relationship, the knowledge and intention of the parties, and especially, as seems apparent in much of Justinian's considerations, to social and official dignity. Such penalties were the confiscation of dower and other property, banishment, forfeiture of military rank (*spoliatio cinguli*), and even corporal chastisement. L. 6, C. (v. 5). Nov. (xii. 1). L. 1, Nov. (civ. 36).

(2) Divorce.

It is well known that the subject of divorce at all times occupied a prominent place in Roman law and manners. This is, perhaps, the more to be wondered at, as the purely contractual view of marriage never seems to have influenced Roman thought or to have affected the conception of it as a life-long condition, lying, when once created, outside the volition of the parties, and wholly within the joint control of regulated custom, religion, and the State. Nevertheless, the form of a purely civil marriage by coemption easily enough lent itself to supply the outward facilities for the practice of divorce, and the deep degradation of Roman manners had so far facilitated the practice at the close of the Republic, that Augustus (B.C. 17), in his divorce code (*lex Julia de adulteriis*), not only republished what were no doubt existing legal rules, but demonstrated the extent to which such rules had already become formulated and applied. This code, indeed, mainly related to divorce as a consequence Paul. Sent. (ii. 26), D. (xlviii. 5).

of adultery, for a conviction of which women were liable to be fined half their dower and a third part of their other property, as well as transported to an island; men were likewise liable to be fined half their property, and similarly transported, but the guilty parties were not to be transported to the same island.

In Justinian's legislation it seems, from a fragment of one of his Novells, that a man could be fined in his wife's favour to the amount of a third of all property she acquired at her marriage, if he attempted to bring about a divorce without sufficient reason assigned. Such reasons or grounds are transcribed in Justinian's code from a constitution of Theodosius and Valens, and they were much the same both for the man and for the woman. They included a strong suspicion on either side of the other party being engaged in adulterous, criminal, or treasonable practices, or keeping the company of flagitious characters, or using or threatening personal violence, especially of a kind outrageous to the freeborn citizen.

Nov. (cvii. cap. 9). L. 8, C. (v. 17).

The mode of effecting a divorce was, in earlier times, nothing more than a mere manifestation of will, testified by such simple words, spoken, or, more frequently, written as "manage your own affairs for yourself," or "keep your own things to yourself" (*Tuas res tibi agito, tuas res tibi habeto*); but by the Julian law, which seems to have prescribed the practice for subsequent times, a divorce was only valid when the causes were judicially approved, and the manifestation of will was made in the presence of seven Roman citizens of full age, besides a freedman of the person making the divorce. The freedmen must have been manumitted by one of the ascendants or descendants of that person.

(3) The Wife's Property.

According to the old Roman law, a wife, with all that belonged to her, continued after marriage either in the power and family of her father, or, through the religious

rites of *confarreatio*, or else through the operation of the fictitious bargain and sale (*coemptio*), completed by the prescriptive time of unbroken possession (*usus*), passed into the power and family of her husband. Whichever alternative condition was presented, there could be logically no question of the wife's property; it was, with all the rights of management and of succession appertaining to it, wholly in the hands either of the father or of the husband.

Nevertheless, either an intuitive sense of the independent claims of womanhood and wifehood, or a recognition of economic advantages favourable to the wife, to the husband, and to the general public, gave rise to the custom of appropriating from the father's stock some of his property to the use of his daughter on her marriage, and for the general purpose of defraying the continuous expenses which would result from it. The property was called the dower or *dos*, and the rules relating to it were amplified under the nurturing protection of the Prætors, the comments of jurists, and the constitutions of emperors, into a tolerably systematic body of law.

The dower or *dos* was, strictly speaking, a gift from the wife's father, made at the time of the marriage, for the use of the husband in meeting the family and household expenses to which the marriage would give rise. By a slight extension of the original principle, the dower might proceed not only from the father but also from the mother or other relations or even friends. Where the father was the giver, it has been customary to call it *profectitia;* where other persons were the givers, it has been called *adventitia.* And in the latter case, if there was an express agreement that it should be restored to the giver at the termination of the marriage, it has been called *receptitia.* Ulp. (vi. 3).

There were originally more formal modes than one in which a wife's estate in dower might be created. At one time a solemn verbal manifestation of the giver's intention sufficed. This was called *dictio dotis.* It was regarded as an instance of what was known as the "verbal" contract, and seems to have be- Ulp. (vi. 1).

come obsolete long before Justinian's time, though the Digest seems to contain allusions to it as to a well understood practice.

L. 44, § 1, D. (xxiii. 3).

The prevalent habit, as alone recognized by law in Justinian's time, was either to engage, by the simple verbal contract of question and answer (*stipulatio*), to give the dower in the event of the marriage taking place, and so soon as it should take place, or else to give the dower at once, on the understood condition of having it returned if the marriage never took place. So soon as the marriage took place the dower was due, and profits and interest had to be accounted for in favour of the married persons. If it were not paid within two years, it could be sued for by the ordinary simple action arising out of the commonest contracts (*condictio*), and interest was calculated at the rate of four per cent., or one-third of the very highest legal rate.

All sorts of property and interests in property might be the subject-matter of dower ; thus, debts, leases, servitudes, as well as money and the fullest rights of ownership in real estate, might be given in this way. The property, too, so given, might be specifically described, or only estimated by weight, number, and measurement ; and it is a question of fact whether the property was to be valued for the purpose of actual sale or for that of calculating the liabilities of the parties (*taxatio*).

The general rule was that the husband had plenary control of the dower, and of all its contingent profits and advantages, for the purpose of providing for the wants of himself, his wife, and his children. Before Justinian's time he was entitled to sell, with his wife's assent, but not to mortgage, it being intimated that a woman could understand the simpler process of sale, but not the less direct and familiar process of a mortgage or pledge. Justinian, however, seems to have not credited women with even this degree of understanding, because he disallowed even a sale of the dower estate.

15 C. (v. 13).

The husband was responsible for his care of the property, and was bound to show as much diligence in protecting specific objects from injury, and the whole

property from loss, as he might be expected to show in the ordinary management of his own affairs. Where the husband was in danger of being reduced to poverty, or of becoming an insolvent, the wife was enabled by a special process to intervene, and secure the management for herself, on condition of employing the property for the original purposes for which it was given. She was always preferred to all other creditors, even though they were protected by "real" securities.

At the termination of the marriage, either by the wife's death or divorce, the husband was bound to make restitution of the dower estate to the persons who were entitled to it. These were, in the case of the *dos profectitia*,—or portion of the estate which came from the wife's father—the father and his heir. In the case of the *dos receptitia* they were, as of course, the givers who had presented the dower on the condition that it should be so restored. In the case of the *dos adventitia*—which came from persons other than the father—Justinian provided that it should go to the wife and her heirs. By the earlier law it remained with the husband. Justinian specially enacted that the restoration of dower was due at once in the case of immovables, and within a year in the case of movables.

Besides the dower estate, properly so called, a husband or other persons might during the marriage increase their estate, or make gifts to the wife (*donatio propter nuptias*), which, being excepted from the ordinary prohibition of gifts between married persons, had to be managed on the same principles as the dower.

In later times, it became a not infrequent custom for a woman to have property of her own (*parapherna*), which was wholly excepted from the regulations which applied to dower, and which, though usually in practice administered by the husband under a higher degree of responsibility than in the case of the dower estate, was, in fact, as much within the legal control of the wife for all purposes as if she were unmarried.

It remains to be noticed that by the well-known marital

legislation of Augustus—entitled the *lex Julia et Papia Poppæa*, followed up by a constitution of Severus—fathers, both natural and adoptive, were compellable by the magistrate to find a fitting marriage for their daughters, and to provide them with an amount of dower proportioned to their own estate, and to the circumstances of the case.

§ 4.—*Guardians and Trustees in Guardianship.* (*Tutores, Curatores*).

The subject of guardianship only belongs to the topic of the family, strictly so called, so far as the institution of the *tutor*—or guardian to the person of the minor—and the *curator*—or managing trustee,—may be treated as supplying the temporary defects in the composition of the family occasioned through death, immature age, or physical calamity, and as a means by which the final purposes of the family as a social group were carried to completion.

It will be convenient to distribute the topic of guardianship generally, under the following heads:—

(1) Nature and purpose of the institution of guardianship.

(2) Modes of appointment of guardians to those under age, and of trustees in guardianship to other persons.

(3) Rights, duties, responsibilities, and liabilities of guardians.

(1) Nature and Purpose of the Institution of Guardianship.

Where, through the death of his father or other person in whose power he was, a citizen became his own master (*sui juris*) but was below the age of fourteen years, or, if a woman, at any age, a substitute for the deceased head of a household was temporarily provided, both to protect the interests of the youthful or incompetent person, and to guard the public against the consequences which might follow from want of judgment and experience.

The office of guardian, so introduced, was regarded as a service of public moment, and not of mere private convenience or arrangement. It was imposed on certain classes of persons, or on certain individual persons, as a public burden or duty to be rendered to the State, which, in default of certain well-recognized grounds of exemption, could not be evaded, nor shifted to the shoulders of another.

The severity of these principles, indeed, only applied to the guardians of those under age, or of women,—though it is uncertain how long, or to what extent the guardianship of women existed. For persons between the ages of fourteen and twenty-five a laxer form of guardianship (*curatela*) was occasionally, though in accordance with strict rules, provided for the protection and management of their property; and it was the same in character,—as in name,—as that by which the interests of the insane and insolvents were guarded against prejudice and loss.

The guardian of those under age differed from all other classes of guardians, not only in the fact that such an official was universally appointed, but also in the significant circumstance that he controlled the whole life of his ward in addition to managing his estate and property.

In the case of all classes of guardians the most rigid securities were taken, both at the time of their entering on the discharge of their functions and on their being released from it, for their faithful execution of the task entrusted to them. They were appointed by methods supposed to imply the highest amount of circumspection and caution; they were subject at every point and turn to magisterial control and, if necessary, intervention; they were bound, on surrendering their post, to present strict accounts, and to make good all deficiencies. Effective judicial remedies and special processes were in vogue for attaining these ends.

(2) Modes of Appointment.

The history of the appointment of guardians follows very closely that of the history of Intestate and Testa-

mentary Succession. Indeed, from a time probably preceding that of the XII. Tables, a fixed notion prevailed that, on the one hand, the best and most natural guardian of the young orphan was the person who was most concerned in maintaining the integrity of the property, because he was the next successor to it; and on the other hand, that the claims on the part of a father to determine by Will who should succeed to his estate supplied at once a precedent and a reason for permitting him to determine the guardian of his children.

The modes of attaining to the office of guardians in Justinian's time were threefold: (*a*) by testamentary disposition (*tutor testamentarius*); (*b*) by propinquity of relationship as ascertained by law (*tutor legitimus*); (*c*) by the appointment of a magistrate (*tutor Atilianus* or *dativus*).

(*a*) It was the oldest parental right, as guaranteed by the XII. Tables, for the head of a family to nominate a guardian to the sons under age, and to the unmarried daughters of any age, whom his death might liberate from parental control; or to posthumous children who would have come under that control, had their father lived. There was no restriction as to the quality of the person who might be selected for the office in the exercise of parental discretion; and as the office was a public service, and not a mere private arrangement, even persons in the control of another might be nominated, as also might magistrates, Prætors, consuls, persons at the time of appointment incapacitated by reason of age or physical infirmity, or by the non-fulfilment of conditions to be satisfied, it may be, at a period later than that of the testator's death. For intervals of time not provided for, a special and temporary appointment was made by the magistrate.

Generally speaking, the guardian appointed by a parental Will was exempted from the necessity of undergoing judicial scrutiny, and of giving the security imposed in other cases; unless, indeed, since the making of the Will, fresh circumstances had supervened by which, owing to the impoverishment of the guardian, or a disclosure of his

previously bad character, or of the bad terms which had existed between him and the testator, the interests of the ward might seem to be prejudiced. In the case of a father or mother providing by will for their natural children, either of them could in the same way nominate a guardian, whose appointment, however, required confirmation at the hands of the magistrate. L. 4 (v. 29).

(*b*) It has already been noticed that it was a fixed principle at all periods that the proper guardian of a person under age was the one who was most directly interested in the protection of his estate, in consequence of being marked out by law as the next successor to it. According to modern ideas, some suspicion pointing to the possibility of what is known in English law as "constructive fraud" would seem to attach to the person who would presumably derive most benefit from certain kinds of misfortune befalling the ward. But the interest in the well-being of the bulk of the estate was supposed likely to predominate in the generality of cases, and consequently the Agnates first, and, on their failing, the Gentiles (or members of the clan), were designated by the XII. Tables as succeeding to the rights of guardianship as well as to the rights of inheritance. Where there were several Agnates equally near, they were all guardians, but the management was entrusted to one.

The same principle of assigning the rights of guardianship to the person or persons who inherited from the ward on an intestate succession, was preserved in the latest legislation of Justinian, when, in his 118th Novell, he reconstituted, for the use of members of the Christian Church, the whole law of intestate succession. In this Novell, he announced broadly that the office of guardianship was to be undertaken by any one who was in the next order of succession to the inheritance, no distinction being made between "Agnates and Cognates." Women were indeed prohibited by the same law from undertaking the office of guardian, except in the case of the mother and the grandmother, who, if they abstained from Nov. (cxviii. 5).

a second marriage, would be preferred to all other candidates for the guardianship of children, with the sole exception of those nominated by Will.

One species of the legitimate guardianship was called *fiduciary*. This name, in Justinian's legislation, meant the guardianship which befell the sons of a deceased emancipating father or master as exercised over previously emancipated children or slaves. In Gaius' time, the term *fiduciary* signified the guardian, who became such through the mere accident of the fictitious legal process which, on a father's three times selling his son in order to emancipate him, required a stranger at last to do the final emancipating act, and so to constitute himself, at least for the moment, a *fiduciary* guardian. Where, under the older law, a "legitimate" guardianship was transferred by the fictitious confession of judgment (*in jure cessio*), the new guardian was called the *cessicius tutor*.

Gaius (i. 166). Ulp. (xi. 5).

(*c*) The first provision made for the appointment of guardians in default of a nomination by Will, or through intestate succession, was made by the *lex Atilia*, from which, in spite of its repeated amendments and amplifications, the name of *Atilianus tutor*, as well as that of *dativus tutor*, was given to all guardians appointed in this way. The appointment by Will might be insufficient or unsatisfactory, owing to the temporary interposition of a condition, or through some accident which might befall a guardian originally appointed, or through some incapacity which time and later events alone could disclose. Justinian, following the policy adopted by his predecessors in view of the extension of the empire, enacted that, whereas generally the appointment of guardians belonged, at Rome, to the præfect of the city or a Prætor, and in the provinces to the presidents or pro-consuls, or their legates, the ordinary municipal magistrates should henceforth appoint to the office, in all cases where the means of the ward did not exceed five hundred solidi (that is, say about four hundred pounds sterling). Besides these municipal magistrates, certain other special officials

D. (xxvi. 5). L. 30, C. (i. 4).

were empowered to make the appointment, as, for instance, the *juridicus* of Alexandria in the presence of the bishop or other public officials.

It was the duty of certain classes of persons to apply to the local magistrate or proper official to have a guardian or trustee in guardianship (*curator*) appointed in cases which called for it. For instance, a mother was bound to apply to have a guardian appointed to her children under age, and where circumstances called for it, a trustee in guardianship for the estate of her children between the age of puberty and their full majority. The mother was punishable, by being deprived of her rights of intestate succession, not only if she failed to make the proper application, but if she applied in favour of guardians or trustees who proved unsuitable. The mother was only excused in cases where the children had no property or were insolvent ; if she were absent and other relations prevented her, or she herself was under twenty-five years of age, or, as in certain cases, acted as guardian herself. D. (xxvii. 6). D. (xxxviii. 17), C. (vi. 56).

Trustees in guardianship (*curatores*) were appointed for a variety of reasons, and differed from the guardians of the young below the age of puberty in that their functions were strictly confined to the protection of the property of those in their charge. They were appointed (*a*) in substitution for guardians when these became temporarily disqualified, or, through litigation, were placed in a position adverse to their wards ; in these last cases, the guardian himself was bound to see that his ward's interests were properly defended by an intermediately nominated trustee. Where the guardianship was completed through the attainment of the age of puberty, a trustee was only appointed where the property at stake was considerable, or where special transactions requiring experience of the world imposed either on the young person himself, or on one with whom he had dealings, the necessity of procuring a competent and legally authorized adviser, in order to secure final validity to what was being done. (*b*) The appointment of a trustee was also made, and, indeed, legally insisted on in all cases

of lunacy, wastefulness of inherited property held to amount to the extravagance of lunacy, and corporeal disease of such a nature as to render the sufferer incompetent to manage his own affairs. Where a trustee for the young, the insane, or the casually incompetent, was nominated by Will, the appointment had to be confirmed by the magistrate. Even in cases where, by well-established principles of law, the trusteeship accompanies the potential right of intestate succession, the Prætor can transfer the trust to another person in whom he has more confidence.

D. (xxvi. 3).

D. (xxvii. 10).

Generally speaking, all persons capable of discharging any public office could be appointed to the office of guardian, and latterly even mothers could be appointed, up to the time of their contracting a second marriage. A woman was indeed held to have a right to the guardianship of her children in the case of there being no testamentary or legitimate guardian, or of a guardian duly appointed excusing himself from serving, on legally recognized grounds, or being removed from office on the ground of his bad character.

C. (v. 35).

Soldiers could not be appointed guardians except to the children of their fellow-soldiers, nor could bishops, priests, deacons, sub-deacons and monks, so long as they were really engaged in their sacred functions, and frequented the churches and monasteries. By a late Novell, this rule was relaxed in the case of priests, deacons, and sub-deacons connected with the ward by blood-relationship. They might retain the office if within four months of being nominated to it they made a written declaration before a competent judge that they had voluntarily undertaken it.

L. 52, C. (i. 3). Nov. C. (xxiii. 5).

Debtors and creditors of the ward, as well as persons specially excepted by the father or mother in their Will, and persons who were known to cherish unfriendly feelings to the parent or ward, were incapacitated.

Besides those actually disqualified by circumstances,

persons nominated as guardians, or who had already completed part service in that capacity, might claim exemption on a variety of grounds. These grounds became in course of time so numerous—as the voluminous list of them in the "Vatican Fragments" of the latter part of the fourth century sufficiently shows—that it might have seemed simpler to get rid of the notion that guardianship was presumably a compulsory office, and instead to substitute the rule that certain persons alone must, in any case, assume the duties. The adoption of the contrary course is an interesting tribute to the strange popular superstition, which renders it much easier to complicate and multiply the detailed applications of an old law, than simply to change it for a new but unfamiliar rule.

Frag. Vat. (i. 2, 3; ii. 4, 7).

Among the more important and permanent grounds of exemption may be enumerated: (1) having children of one's own, as many as three in Rome, four in Italy, or five in the provinces; (2) absence on affairs of State; (3) occupation in managing the public finances or the emperor's private affairs; (4) holding a magisterial office of such a degree of dignity that the holder could peremptorily order an offender to prison; (5) incapacity, such as arises from poverty, or from already having three guardianships on hand; (6) physical infirmity.

There were certain grounds on which, after appointment, a guardian might be removed from office as being "suspected." These grounds were not only such as were due to moral shortcomings, but also to mere neglect or omissions of duty. Such grounds were: (1) proved outbreak of ill-feeling between the guardian and either the ward or the ward's father; (2) the discovery of infamous transactions in the past; (3) fraudulently preventing the ward accepting an inheritance; (4) neglecting to make an inventory; (5) alienating immovable property without a decree; (6) malversation and peculation; (7) concealing himself,—as by not appearing on judicial summons, or by refusing to communicate with his colleagues.

There were certain definite guarantees which were

judicially insisted upon at the hands of guardians and trustees in guardianship for the due discharge of their duties. Such were: (1) the oath; (2) a personal security or suretyship; (3) the inventory.

(1) It appears from a passage in Justinian's Novells, that in his time it was the general custom to exact an oath from all classes of guardians, at least where the property was small at the time of their entering on their duties. The oath had to be made by touching a copy of the four Gospels, and Justinian intimates that the precaution had to be extended to all cases in which, owing to the task of appointing a guardian being cast on the magistrate, the emperor might be regarded as standing in the place of the ward's parent, and as making the most careful provisions accordingly.

Nov. (lxxii. 8).

(2) Personal security, or security by help of sureties (*fide iussores*), had to be found by all guardians and trustees in guardianship, except those who were appointed by Will or by a magistrate after the usual searching investigation of competency. In every case, however, where the actual administration of affairs was committed to one of a number of guardians, however appointed, he had to give security. The penalty for not providing the requisite security was not only the invalidity of all acts done, but the forcible exaction of security by judicial seizure of pledges, or where such pledges were not forthcoming, the removal from office of the guardian or trustee, and with the stigma of infamy if the existence of fraud were established.

J. (i. 24). D. (xlvi. 6).

It was the duty of the guardian to see that on the appointment of a trustee, either as a temporary substitute for himself or as a successor, proper security was obtained. If the ward suffered any loss through the default of security, besides the usual remedies against the guardians and trustees for default of duty, he had a special right of action (*ex stipulatu*) against the sureties, or even against persons who had informally vouched in favour of the defaulter (*nominatores, affirmatores*). The ward had further a special right of action (*subsidiaria actio*) against the

magistrate who had either failed to insist on security or had accepted insufficient security.

(3) There was a general necessity, incumbent on guardians of all classes, of making, at the time of entering upon their office, a schedule or inventory (*inventarium, repertorium*) of all the property of the ward. This schedule was a public document, and had to be made under the superintendence of a public official. The guardian was absolutely bound by what he had included in it, even though he had over-stated the amount of the property. The only case in which a guardian was exempted from this necessity was where a testator, whether a parent or other person, had specially declared that the property he bequeathed to the ward should not impose on the guardian the necessity of thus having it publicly scheduled. Where the schedule was omitted without reason, all acts done by the guardian were invalid, and he was liable to be removed from his office as a suspected person. It is to be remembered that no language of a testator could exempt a guardian from the universal necessity of making a rigorous account at the close of the guardianship of all property entrusted to his care.

L. 13, C. (v. 52).

(3) Rights, Duties, Responsibilities, and Liabilities of Guardians.

The duties of guardians, properly so called, that is, those in charge of persons under the age of fourteen years, extended to three classes of business. (*a*) The management, improvement, and preservation of the ward's estate; (*b*) the education, maintenance, and general care of the ward; (*c*) the acting on behalf of the ward or co-operating with him in his acts, in order to impart to them legal validity.

(*a*) With respect to the management, improvement, and preservation of the ward's estate, it may be said generally that he was bound to take as much care of the property and to watch as providently and anxiously for its increase

as if it had been his own ; but he was not liable to show a greater degree of solicitude than this would imply—unless, indeed, he had obtruded himself into the management without formal appointment. Where his heirs were not enriched by his transactions, they were only liable to make good his shortcomings in the case of extraordinary negligence (*lata culpa*).

The management of the estate included not merely the work of an ordinary agriculturist, householder, or temporary agent, but also such more adventurous enterprises as a moneyed citizen might be expected usually to occupy himself in. Such enterprises included the judicious selection of new investments, the purchase of estates, and the sale of things which could not be advantageously retained. If the guardian neglected to make the gains which seemed open in these directions, he was liable, within two months of assuming the management, to make good the speculative loss himself, or, under the older law, if he were unable to make restitution, was liable to judicial punishment (*extra ordinem coerceri*). Justinian, however, relieved the position of guardians in this respect by allowing them to replace gradually the missing gains, except in the case where the ward's provision for his necessary subsistence had suffered.

L. 7, D. (xxvi. 7). Nov. (lxxii. 5, 6, 7).

These duties were generally the same for all classes of guardians, whether the person in charge were one under the age of puberty, or a minor under the age of twenty-five, or a lunatic, or insolvent. It need not be said that all the guardian's acts had to be free from the remotest suspicion, not only of actual fraud, but of all attempt indirectly to advance his own pecuniary interests through the use, let alone the abuse, of his position. The searching principles by which Roman law and procedure at all times tested, detected, and anticipated the possible presence of fraudulent motives were in no points more signally illustrated than in the rules of law applicable to guardianship. Indeed, in some respects, the conduct of guardians was so strictly watched that they were not allowed anything approaching to the latitude of discretion which a house-

holder would have in managing his own affairs. An instance of this judicial vigilance is supplied by the law of the Emperor Severus, by which he positively prohibited guardians of all classes from alienating landed estate, unless such alienation were expressly directed by a parent's Will, or the property in movables was insufficient to meet the debts. In this last case a special application had to be made to the Prætor, who would take account of what property ought to be turned into money or burdened, it being open to the ward at any time to prove that the Prætor had been fraudulently imposed upon. L. 1, D. (xxvii. 9).

In the case of the trustee appointed to protect the property of a spendthrift (*curator prodigi*), the administration of the property was the sole purpose of the trust. The institution descended from the XII. Tables, but had been amplified by successive Prætors, who, "where they had brought to them a person who in the lavish and extravagant expenditure of his property observed the restraints neither of time nor of proportion," appointed a trustee to manage the estate till the spendthrift had recovered his senses. In the meantime the person under charge was prohibited by the Prætor's interdict from intervening in his own affairs. The property here alone involved was property acquired by descent from ancestors, and the whole of the law appertaining to it was strictly analogous to, or, rather, identical with, that applicable to the case of a temporarily insane person, so long as the insanity lasted.

(*b*) The functions of a guardian to one under age were described as extending to "education and administration of the estate." The word education means generally bringing up, and includes making provisions for the ward's residence, daily nurture, and general supply to him of such necessaries, conveniences, or luxuries of life, as the habits or intention of his parents and the amount of the estate may indicate. It was the general rule, which Justinian supplied by his latest legislation, that the mother was the first and most proper person to be placed in direct

charge of her children, always supposing that she had not married a second time, and was living respectably. Where the ward could not be committed to the mother's care, the local magistrate would, on application and inquiry, make a special order with reference to the bringing up of the ward.

D. (xxvii. 2). L. 1, C. (v. 49). Nov. (xxii. 38).

The guardian was bound to carry out, as far as he could, the wishes of the ward's parents as to the maintenance, instruction, and social surroundings which he provided for the ward; and in doing this he was entitled to make reasonable disbursements for educational purposes of all sorts, in view of the ward's social position and natural aspirations. But for the purpose of making special grants out of the estate, that is, presumably out of the principal stock as opposed to the periodic income, the magistrate had to be applied to and requested to make an order, on being informed of all the circumstances of the case. Where publicity was undesirable and the magistrate reposed a high amount of confidence in the guardian's honesty and discretion, the responsibility was again remitted to him.

In the case of the trustees appointed for the guardianship of women (as on behalf of unborn children—*ventris in possessionem missio*), of the insane, and of otherwise presumably incompetent persons, a like discretion, exercised under judicial supervision, had to be exercised with respect to the provision of all that was included under the heads of "food, drink, clothing, and lodging." General economical rules of management were laid down as before, such as that provision for these expenses was first to be made out of ready money in hand, and, where that was insufficient, by disposing of those things which were rather of a burdensome than productive kind.

D. (xxxvii. 9). L. 20, D. (xxxvii. 9).

(*c*) The most characteristic function of a guardian was to supplement the presumed want of capacity, mental or physical, as well as of knowledge and experience in the ward, by acting on the ward's behalf or supplying legal co-operation in his ward's acts. Thus, the functions of the

guardian in this respect were of two kinds, the one independent and private action, the other supplementary and co-operative action. It was to this latter that the term *auctoritas*, signifying "authoritative cogency," was given. The guardian's active interposition of this sort was imperatively required in certain transactions of the ward's, and apart from it they had no validity.

For the first years of infancy, which was generally held to terminate at the age of seven, the ward could do no valid act whatever. During the years which intervened between infancy and puberty, it was said, in compendious language, that the ward could make his affairs better, but not make them worse. Thus, he could pay a debt, but not receive payment of a debt due to himself. He could receive a gift, but not make one. But this principle was not held to apply to the more complicated transactions in respect of which, however really beneficial to the ward, yet through miscalculation, error, or bad management, loss might be finally incurred.

Hence the direct interposition of the guardian was needed for such transactions as entering on an inheritance, making application to be put in possession of an estate passing by inheritance, and receiving the benefit of a trust created by Will. The interposition of the guardian must be made while the transaction was proceeding, and not before or afterwards. The guardian must be actually present, and the consent must be unconditional, and delivered in some solemn form such as, I authorize this act (*ego in hanc rem auctor fio*). A guardian could not authorize any act in which he had a personal concern, and where a suit between the ward and guardian sprang up a temporary trustee (*curator*) was appointed. At one time a special guardian was appointed for this purpose (*Prætorianus tutor*). In the case of guardians appointed by Will, the authoritative interposition of any one of them sufficed. Under the older laws, guardians appointed in all other ways must give a simultaneous assent. Under Justinian's law, the consent of one guardian sufficed in all cases where the act was not of a kind to involve a final

dissolution of the tie between guardian and ward, as where the ward allowed himself to be adopted (*arrogatio*) by another.

Guardians of all classes were under the most stringent liabilities, not only to keep accounts throughout their tenure of office, but to furnish an exact and detailed statement of how the accounts stood between themselves and their wards at the end of the guardianship. Where, for purposes of convenient management, one guardian had acted on behalf of the rest, he would be held alone responsible, or responsible jointly with each of the others to the whole amount, according as the distribution of functions was enjoined by the magistrate or testator, or was a mere expedient spontaneously resorted to by the guardians themselves. Wards under age had a general charge, by way of hypothecation, on the property of their guardians. The guardian himself had efficient remedies against the ward in the form of the *contraria tutelæ actio*, or an action analogous to it (*utilis actio*). The remedies of wards were found in the several actions: *tutelæ*, *de rationibus distrahendis*, and *utilis curationis causa*.

CHAPTER V.

SUCCESSION.

THE principles which in Roman law regulated the rights of succession to an estate of a deceased person are so closely connected with the root conception of the Roman family that the subject of it is most appropriately considered by way of sequence to the treatment of family law. Inasmuch, too, as every department of law is affected in some degree by the law of succession, the consideration of this law, properly, has a place to itself, and that place is conveniently found at the close of the whole, just before the place of the law relating to Remedial Processes and Actions.

The essential idea of the Roman family was that it was indestructible and knew no suspense or intermission in its vitality. The death of its head was only an incident in the fortunes of the family, analogous to the birth and adoption of new members, or to the gains and losses resulting from marriage, divorce, legitimation, and emancipation. The individual atoms of the family underwent all sorts of fluctional changes, but the only change that the family itself underwent was that of distribution and indefinite extension. Thus, the death of the head of the family, instead of dissolving the corporate unity of the family, only reproduced it in a more richly vitalized form. This was expressed in two legal circumstances or consequences. One was that the effect of the death of the head of the family was to call into existence a number of new families, of which each male citizen, liberated from the parental control by death, was severally head, and all of

which new families still continued closely bound throughout in the tie of "agnation," resulting from their previous common subjection. The other circumstance or consequence was that the estate of the deceased as well as all his personal obligations were held in the eye of the law to be preserved in their integrity, unimpaired by the fact of the death, and only waiting for the appearance of the person or persons who, as "heir or heirs," should, for all purposes, assume and carry on the personality of the deceased.

The importance which the earliest Roman law affixed to this non-intermission of personality, and to the preservation of the unity of the estate and obligations, was no doubt due, partly to a religious anxiety for the due and unbroken observance of the family sacred rites, and partly to regard for the interest of creditors and the public that some administrator should be as soon as possible forthcoming. Anyway, the idea that an heir of some sort, who should directly represent the deceased for all legal purposes, became so fixed an institution that it dominated all the rival conceptions which have under other systems of law competed with it or excluded it. In France, for instance, the dominant idea is that of equal distribution of the deceased's estate among the children. In England, the dominant ideas are based on a flickering combination of deferential regard to the caprices of a testator and a predilection for the claims of primogeniture. In the older systems of Indian law, the claims of religious institutions and of the widow assume marked prominence. Contrasted with all these and like systems, the Roman law of succession finds its centre in the heir, in the modes of his appointment, in the formalities attending his entering upon his functions, in his rights, duties, and liabilities of all sorts.

Thus the first point that invites attention relates to the mode in which the person is selected who, on the death of another, takes his place as the "universal successor" to the inheritance which, for the moment, is relinquished (*jacens*) by its previous occupier. This person, as heir, is called to own and manage the intestate's or

testator's property, and to assume the responsibilities, or use the advantages, of the obligations subsisting at the time of his death.

There were two modes in which a person might be called to the position of heir. (1) One was by the operation of the general law; (2) the other by Will. It may be said by way of preface that whether the heir was called to the office by the operation of law, or by a testator's will, he might stand in need of a magistrate's special intervention to obtain possession of the estate, or of the individual things of which it was composed. Thus, even where there was a Will which was good for all other purposes, the magistrate might not recognize the nomination which the testator had made of his heir, because he had omitted mention of some of his children. In this case the omitted children would be put in possession of the property and required to discharge the functions of heirs according to the prescriptions of the deceased (*possessio contra tabulas*). So, again, if any provisional dispute should arise as to the claims of the testamentary heir, the magistrate would put him in possession (*secundum tabulas*), and reserve the matters in doubt for decision afterwards. Similarly, by what is known as the *Carbonianum Edictum*, the magistrate gave possession as heirs to children under age, whose relation to the deceased was controverted, the decision of the point being left until they came to be of full age. Possession in this case was only given when it was in despite of the express declaration of the deceased (*contra tabulas*).

D. (xxxvii. 10).

In Justinian's time, it was of little consequence whether the heir entered on the estate by the mere force of law or by the Will, or whether he was supported by a possessory interdict of the magistrate. The distinction between the value of rights existing under the older civil law, strictly so called, and those under the Prætor's Edict was scarcely any longer perceptible, and the legal position of a possessor supported by an interdict practically differed only in name from that of a full owner.

§ 1.—*Selection of Heir by Operation of Law.*

The history of intestate succession from the earliest times to the latest legislation of Justinian in the 118th Novell exhibits in an interesting and instructive form the progress of the slow and steady competition between the claims of the strict civil law, as consecrated by usage, tradition, and professional routine, and the claims of nature as vindicated by the casual intervention of the Prætor and the determined control of the legislature. There was no part of the law better settled, and deriving more distinct authority from the express language of the XII. Tables, than the rules for deciding between the various claimants to an intestate estate. There was no more prominent, more precise, or more beneficial portion of the Prætor's Edict, than that in which he disturbed the operation of those rules and announced himself as ready, by the use of the potent machinery of possessory interdicts at his disposal, to prefer, as opportunity presented itself, the claims of the natural family to the claims of that family which at the best was only an artificial and somewhat cumbersome creation of the civil law.

The account of the historical development of the law of intestate succession, as given by the original authorities, is much implicated with the relations of the patron and his freedmen. But this part of the law is so arbitrary in itself, is so entirely obsolete, and had so little influence on other parts of the law, that no more need be said upon it than has already been said in connection with the general subject of freedmen in the last chapter.

The rules of intestate succession may be described as belonging to three periods, or as occupying three stages: the primitive, the intermediate, and the final.

(1) Primitive Period.

In the primitive period or stage, before the Prætor's influence was felt, the order of the classes of claimants to an intestate estate was arranged in the following scale:

(*a*) The intestate's own immediate "heirs," properly so called, that is, the persons who, by his death, would cease to be under the control of himself or any one else (*sui heredes*).

(*b*) The agnates, or persons whose ascendants have been subject to one family head.

(*c*) The members of the intestate's gens (*gentiles*) or family stock.

For a proper understanding of the term agnates, as well as of the other terms of relationship used in this chapter, reference must be made to the full explanations given in the previous chapter in connection with the subject of the impediments to marriage.

(2) Intermediate Period.

The order in which different classes of claimants were called to the inheritance between the epoch of the XII. Tables and that of Justinian's final legislation was determined by three controlling influences, which all co-operated in the same direction to substitute as grounds of claim blood-relationships for the artificial relationships of the civil law. One of the controlling influences was the Prætor's Edict; another was the occasional legislation which,—usually in the form of decrees of the senate,—proceeded from competent legislative bodies; the third was a "constitution," or direct legislative interposition of the emperor. These three modifying forces worked in harmonious combination, and steadily tended to one and the same end. In the time of Justinian, the order of intestate succession was for all emergencies formulated with as much distinctness and uniformity as under the oldest civil law. While the root conceptions of that law were recognized and referred to, the superior claims suggested by a wider sense of humanity and a more complex civilization were vindicated to the full. The result was the following scale of preferential succession:—

(*a*) The deceased's children (*unde liberi*).

(*b*) Persons claiming under the strict rules of the civil law or statute legislation (*unde legitimi*).

(*c*) Blood-relations, specially called to the inheritance by the Prætor's Edict (*unde cognati*).

(*d*) Husband and wife in succession to each other (*unde vir et uxor*).

(*a*) The intestate's children (*unde liberi*), that is, his children born in wedlock, or legitimated, or adopted, unless subsequently emancipated; though, by Justinian's time, the fact of being adopted by another, or otherwise emancipated, was not a bar to a claim under this head. In the last case, however, a special provision was made that where an emancipated child had children of his own, who at the time of their father's death were in their grandfather's power, they succeeded to their father's property in the lifetime of their grandfather.

L. 7, D. (xxxvii. 4).

(*b*) The persons entitled by strict law (*unde legitimi*), whether that law were derived from the XII. Tables, or from the well-established principles of the *jus civile* or common law, or from positive enactments of competent legislative bodies. This still excluded the persons admissible by another head of the Prætor's Edict, or, generally speaking, by the constitutions of emperors. It is to be remarked that the same persons might succeed under different heads—that is, if through any formal failure of their title they did not establish their claim by the strict civil law or by statute under this head, they might come in under the next head by force of the Prætor's Edict, which made a special place for blood-relations otherwise excluded. In this way it was said a person might be heir to himself.

The strict civil law, as modified by statute, prescribed the order of succession as follows:

(*α*) The intestate's own immediate "heirs" (*sui heredes*).

(*β*) The agnates nearest to the deceased, preference however being given (i.) to emancipated brothers and sisters placed by the Anastasian law nearly on a par with brothers still in the family at the time of deceased's death: (ii.) to the mothers, by the *Senatus consultum Tertullianum*.

1 J. (iii. 5). L. 4, C. (v. 30).

According to this *senatus consultum* and Justinian's amendments to it, the mother only succeeded where the deceased left neither children who came into full possession of independence by their father's death, nor a father nor brother by the same father. Such a brother surviving entirely excluded the mother, but a sister by the same father was admitted only on a par with the mother ; where there were both a brother and sister they shared the inheritance between them, to the exclusion of the mother. Justinian's legislation improved the position of the mother, not only by abolishing all the restrictions based on the marriage laws of the Augustan period in favour of large families (*lex Julia* and *Papia Poppæa*), but by providing that where there were only sisters and the mother surviving the mother should take half, and the other half should be divided among the sisters ; where there was a brother or brothers, or brothers and sisters, the inheritance should be distributed equally among the whole, the mother reckoning as one person only (*in capita*).

(γ) Similarly, in assigning a place in the order of inheritance to those having a strictly legal claim, children were preferred to all other relations in the inheritance of their intestate mothers, in compliance with the *Senatus consultum Orphitianum.* By a later amendment, grandchildren, male and female, were similarly called to the inheritance. J. (iii. 4).

The different classes of persons above enumerated, as admitted to the inheritance by the Prætor, because of their claims under the strict civil law, or by statutes and their amendments, may be exhibited in the following order, according to the rank which they took in the succession.

(*a*) The *sui heredes.*

(*b*) Children or grandchildren claiming the estate of an intestate female parent, under the *Senatus consultum Orphitianum.*

(*c*) Mothers, or mothers and brothers and sisters jointly, claiming under the *Senatus consultum Tertullianum.*

(*d*) Brothers and sisters (emancipated), under the Anastasian law.

(*e*) The nearest agnates, that is, all the persons related to the deceased in the first degree of agnation.

(*a*) The *sui heredes* have been described as the persons who, by the intestate's death, are freed from his and all other family control. This excludes those under the control of their grandfather at the time of their father's death, but includes those children born to the deceased father after his emancipation, though the grandfather be living. A person might sometimes become a *suus heres* even though he was not in his father's power at the time of his death—as, for instance, by returning afterwards from captivity and being reinstated in all his civil rights (*jus postliminii*); or he might be, on the other hand, a *suus heres* at the time of death, but, through his father being subsequently attainted of treason (*perduellionis reus*), might lose his position and rights, the inheritance being confiscated to the public treasury.

Among the *sui heredes* where a deceased person was only represented by his children or grandchildren, these only succeeded jointly to their parents' share, the inheritance being divided, as it was said, into stocks and not into heads (*in stirpes non in capita*).

In inquiring whether the *sui heredes* were called to the inheritance, and whether there were a vacant inheritance for them to take, the point of time to which attention must be directed is that at which it is certain, either that the deceased has died without making any will, or that his will is invalid, or that the heir or the children admitted first by the Prætor finally refuse to enter on the inheritance.

(*b*) In respect of the succession of the agnates, a curious inequality had existed under the law intermediate between the time of the XII. Tables and that of the imperial legislation, under the system of what Justinian calls the *Media Jurisprudentia*. The law of the XII. Tables called to the inheritance all the males and females of each successive grade on equal terms. The intermediate system prevented women succeeding as agnates in any remoter grade than

that of sisters. It was to remedy this, says Justinian, that the Prætor called women to the succession under the head *unde cognati.* Justinian, while remedying the grosser inequality of the intermediate system, yet abstained at first, and before the time of his final legislation on the subject in the Novells from placing men and women entirely on a par as legitimate successors by agnation. Men and women were to be called on equal terms to the inheritance, in all grades as far as the sons and daughters of a deceased brother claiming their uncle's inheritance, or as the son and daughter of a deceased sister of the half-blood claiming to succeed to their uncle on the mother's side. 3 J. (iii. 2). L. 14, C. (vi. 57).

It was only the *nearest* agnate or agnates who were called to the succession, and each grade took "by heads and not by stocks" (*in capita non in stirpes*).

Where, for any reason, one degree of agnates on being called to the inheritance either disdains it or dies before entrance on it, the next degree is not admitted, but the Prætor proceeds to call persons under the next head just as if there were no agnates at all.

(*c*) (*Unde cognati*). The degrees of cognation have been explained in the course of treating of the impediments to marriage. It is sufficient to say that the Prætor admitted to the inheritance each degree in succession up to the sixth degree or, in the solitary case of the children of second cousins, (*sobrini sobrinæve nati natæve*) to the seventh degree. 5 J. (iii. 5). 6 J. (iii. 6).

(*d*) (*Unde vir et uxor*). If the cognates failed, the Prætor next called to the inheritance the surviving husband or wife. There must be a legally subsisting marriage at the time of the decease, and facts amounting to a divorce would not of themselves impair the right of succession if the marriage still existed in strict law. D.(xxxviii. 11).

The Prætor defined the length of time within which

application must be made under a claim to the succession. Ascendants and descendants—natural and adopted—were allowed a year in which to prefer their claim, or to respond to the call of the Prætor; these were held to be specially concerned in the property, as being, in a certain manner, their own. All other persons were restricted to a hundred days, application on the last, or hundredth day, being sufficient. Where one person entitled in a particular grade failed to apply in the proper time, his share accrued to the other members of the same grade; where there were none such, the next grade was called. Where the inheritance is positively rejected (*repudiare*), the next claimants are called without further delay, except in their favour. Where, owing to absence, ignorance of fact, or want of education (*rusticitas*), the limits of time for parents or very near relatives forwarding their claims were not strictly observed, the time was judicially extended; and the same consideration was shown where the claim was made informally, or before it had legally attached.

D. (xxxviii. 9).

§. 10, J. (iii. 9). L. 8, 9, C. (vi. 9).

(3) Justinian's Final Legislation.

It remains to give some account of Justinian's final legislation in the matter of intestate succession, that which is expressed in the 118th Novell as well as in the 74th and 89th. This legislation, from the use or benefit of which all persons who were not orthodox members of the Christian Church were excluded, entirely revolutionized the older law. It is, however, in some respects, of far higher modern interest than the older law, because, through the medium of the canon law, it has become the type of intestate succession in all the continental countries of Europe, and even in England.

The existing mode of distributing personal property in accordance with the statute of James I.'s reign for the distribution of the estate of intestates is almost an exact reproduction of Justinian's rules. These rules, indeed, were at the time not so much a violent innovation as

the summing up, in a codified form, of a number of conclusions, tendencies, and practices, which the long tale of legislation by the Prætor, the senate, the legislative assemblies, and a succession of emperors, had slowly and progressively evolved. What had long been practically obsolete is boldly pruned away. What was gradually making head as an acknowledged improvement is finally adopted and universally recognized. Long cherished forms are no longer retained out of mere superstitious reverence for the familiar and the existing. The very sources of the law so long distributed between what was immemorial usage, what was equitable amendment of that usage, and what was statutory or imperial legislation, are traced to the one pure fountain of the will of the emperor. Whatever may have been the effect on society, there is no doubt of the gain to the legal profession and to the future harmony and logical exactness of the legal system, or,—what was more important in the actual condition of the world,—of any future legal system which might hereafter embody it.

The system of distribution of the estate of intestates under the 118th Novell rested mainly on the decisive preference at all points of blood-relationship to civil relationship, and of the natural family to the artificial civil family. Thus, a man's proper heirs under the old civil law (*sui heredes*) are no longer heard of, nor are agnates, (or relations solely on the father's side) any longer pitted against the cognates (or relations on the father's or mother's side). Another principle of the new system was the equalization at every point of men and women.

Before enumerating the orders of succession, as prescribed by the new legislation, it will be convenient to notice some general principles which apply throughout.

The civil practice of adoption was so far recognized as that those adopted by ascendants (*per adoptionem plenem*) and those "arrogated" are ranged in all respects on a par with naturally born children. Cognates, to be reckoned such for purposes of succession, must, at the least, have been conceived at the time of the death. A woman and her

cognates (including among the latter children not born in wedlock as well as the offspring of incestuous or adulterous unions, if not purporting to be formal marriages) mutually succeeded to each other's estates according to the general provisions of the law. Legitimated children succeeded on a par with naturally born children. If a deceased person left neither a legitimate wife nor children, his children born in concubinage and their mother took one-sixth part of the inheritance. In the case of adoption by one not an ascendant (*minus plena adoptio*), the adopted child, but not his cognates, succeeded to the adoptor's inheritance. Adoption and arrogation were no bar either way to a succession based on blood-relationship.

Nov. (lxxxix, 15).

There was no limit of degree to the persons who were called in successive order to the inheritance. The fact and degree of cognation were estimated with reference to the moment at which it became certain, either that the deceased had died without a Will, or that no heir would, in fact, succeed under what purported to be a Will.

The order of succession was four-fold, and may be arranged as follows—

(*a*) Descendants.

(*b*) Ascendants and brothers and sisters of the whole blood, with their children.

(*c*) Brothers and sisters of the half-blood, with their children.

(*d*) Remaining cognates in successive grades.

(*e*) Husband and wife.

(*f*) The imperial treasury, or certain special classes of persons, as the members of the deceased's profession, town council, church, monastery, partnership-firm, and, more especially, an indigent widow.

(*a*) Descendants.

Children were called on equal terms, whether male or female, and irrespective of whose power they were under, at the time of the decease. Where children had died and

left children or grandchildren of their own, these took their parents' place and share. If all the sons and daughters had died, and only grandchildren survived, the inheritance was distributed equally among all the individual claimants (*in capita*). If some only of the deceased's children survived, the inheritance was distributed according to the number of the deceased's children (*in stirpes*). It was in this first rank that a mother's children, whether born in wedlock or not, succeeded to her inheritance.

(*b*) Ascendants and Brothers and Sisters of the whole Blood, with their Children.

Where several ascendants survived, the nearest grade of cognation was preferred to all the rest, and, as between the father's and mother's sides, the inheritance was distributed equally between them. Where there were brothers or sisters of the whole blood, each of them took a share of the inheritance equal to that of the nearest ascendants. Where a deceased brother had left children, they succeeded to their father's share. This was an amendment, introduced by the 127th Novell, on the rule of the 118th Novell which excluded the children of brothers and sisters from this place in the succession. Nov. (cxxvii. 1).

According to the letter of the law, these children could not be admitted where none of their uncles survived, but this seems scarcely reasonable, and, therefore, the omission of the case of the deceased leaving only ascendants and nephews and nieces was probably accidental.

Where there were no ascendants, the brothers and sisters, or their children, if deceased, taking together their parent's presumable share, divided the inheritance equally. Where only nephews and nieces survived, it is left uncertain whether they succeeded by "heads or stocks." The analogy of the older law, which was never abandoned without reason, would favour the division into heads. L. 2, § 2, D.(xxxviii.16)

(*c*) Brothers and Sisters of the half-blood, with their children.

In the third order, brothers and sisters of the half-blood were admitted on exactly the same terms as brothers and sisters of the whole blood in the previous order. Similarly, children represented their parent and together took his share. Some uncertainty prevails, when none but such nephews and nieces survived, as to whether the inheritance was distributed by heads or stocks.

(*d*) Cognates generally.

In the fourth order, all the remaining cognates were admitted, a nearer grade being called before the next remoter one, and those in the same grade having the inheritance equally distributed among them.

(*e*) Husband and Wife.

In the fifth order, husband and wife were admitted to each other's inheritance, according to the provisions of the older law.

(*f*) The Imperial Treasury and certain special Claimants.

Where the deceased left no surviving cognate or married partner, the imperial treasury claimed the inheritance; but a period of four years had to elapse within which a successor might be recognized. The treasury was not treated as an heir, but it was held bound to satisfy creditors and even to pay legacies left by codicil. The period of four years was calculated from the time that it was certain a Will was invalid, or, in case of an intestacy, from the time when the successive claimants had failed to avail themselves of the period allowed them to take up their rights.

L. 10, D. (xliv. 3).

In place of the treasury, the privilege of succession was

conceded to certain special classes of persons, besides those briefly enumerated above. Among these were, any one who had voluntarily undertaken the care of the deceased—if the deceased had been insane and neglected by his natural relations. Such a person was admitted to the exclusion of all the cognates. Similarly, if a rich man left an indigent widow without a dower, she and her children were called together to a share in the inheritance. The question of wealth and poverty sufficient to bring this part of the law into application was one for the judge's discretion. If the husband left the wife property by legacy or otherwise, a proportional reduction took place; but the husband could not, by Will, deprive his wife of this portion. At one time, Justinian allowed an indigent husband in like circumstances to inherit a fourth part of a rich wife's estate, but in his later legislation he repealed this law and disallowed the husband's claim. By the eighteenth Novell Justinian had provided that when a deceased had brought up a family of illegitimate children, the mother of whom lived in his house, they should be entitled to a sixth part of the inheritance, the mother taking an equal share of the part with each child.

Nov. (liii. 6). Nov. (cxvii. 5).

§ 2.—*Selection of Heir by the Will of the Deceased.*

Historical Enumeration of the various sorts of Wills.

It is well known that in the earliest days of Rome, that is, at some time before the date of the XII. Tables, the conception of a Will in the modern sense had not arisen. The inheritance of a deceased person either went to a person or classes of persons generally designated by law, or had been formally transferred to another before his decease. It is out of this formal and public transfer that the gradual growth of the idea of a Will manifested itself. Up to the latest days of Justinian's legislation, the

witnesses to the Will fulfilled the most important functions; and there was a certain relic of publicity attaching even to documents in which privacy was chiefly regarded. This was not only because of the contingent claims, in the event of an intestacy, of large and important classes of claimants, such as the *gens* or clan and the State treasury, but because of the semi-official position attributed to the heir and the guardians or other trustees in guardianship appointed under a Will.

(1) The various Wills prevalent at different epochs in the history of the Roman community, many of them existing contemporaneously, may be enumerated as follows:

(*a*) The Will by formal alienation in life in the public assembly (*calatis comitiis*).

(*b*) The Will made at the outset of a military expedition (*in procinctu*).

Cic. de Orat. (i. 53). Plutarch, Conolanus.

(*c*) The Will by fictitious sale to the heir, signified by the scales, brass coin, and presence of witnesses and of the purchaser (*per æs et libram*).

(*d*) Modification of (*c*) for purposes of privacy, accomplished by making the purchaser (*familiæ emptor*) personate the heir, and by instructing the heir in a document not at the time published.

(*e*) The prætorial Will, in which all fictitious solemnities were dispensed with, and the only ceremonial required consisted of the presence of seven witnesses, who must attach their seal to the document purporting to be a Will.

(*f*) The imperial Will of a private kind before Justinian's time, in which seven witnesses attached their signatures and seals, though ignorant of the contents. This was called the tripartite Will, from the three different quarters,—the civil law, the Prætor's jurisdiction, and the imperial constitutions,—to which its formalities could be traced. This is the direct ancestor of the modern continental "mystic" or "olographic" Will.

L. 21, C. (vi. 23).

(*g*) The imperial Will under Justinian, of a private kind, in which the testator or the witnesses wrote the heir's name. This necessity was subsequently dispensed with.

L. 4, J. (ii. 10). Nov. (cxix. 9).

(*h*) The imperial Will, introduced by Honorius and Theodosius, of a public kind, of which the only formality was public registration in an imperial or provincial office, in accordance with the law, or by special imperial permission. L. 19, C. (vi. 23).

(*i*) The unwritten Will of Justinian's time, in which the only requisites were the presence of seven witnesses and the public nomination of the heir in their hearing.

(*j*) Certain Wills of special classes of persons—as of the blind, of soldiers, of parents in respect of their children, of persons in rural districts without access to suitable witnesses, and of persons labouring under contagious diseases.

The first two of these kinds of Wills—(*a*) and (*b*)—were already obsolete in Gaius' time. The third (*c*), by fictitious sale, still survived in a modified form of (*d*). The Prætorian will (*e*) was rendered superfluous by the imperial enactments; and thus, in Justinian's time, the only subsisting wills were the public and private written Wills (*g*) and (*h*), the unwritten Will (*i*), and the Wills of special classes of persons (*j*).

The peculiarity of soldiers' Wills was found in the fact that they were exempted from the requirement of every sort of formality. It was said that soldiers, as also sailors of the fleet, might make their Will on their shield or their helmet, in the dust with their sword or with their blood. All that was required was the testimony of at least two witnesses, casually present, to the fact of the Will having been made. A son in his father's control could make a Will of this class, as also one otherwise incompetent, as being deaf and dumb. They enjoyed the right of naming as heirs persons who would otherwise be incompetent to assume the office. They might pass over their children in silence, and were relieved from any attention to the claims of near relations. They might be partially intestate, give in legacies more than three-fourths of the inheritance, make numerous Wills, and name the heir in a codicil. These privileges only lasted during actual service in the

field or in camp, and Wills so made remained in force for a year after a soldier's discharge. The soldier's Will was first introduced by Julius Cæsar.

D. (xxix. 1).

In the Wills of blind persons, certain special precautions were taken to secure that the testator knew what was being written down in the presence of the witnesses. The testator might either instruct a public clerk in the presence of witnesses, who all added their signatures and seals, or entrust the writing beforehand to some one else and have it read out by the clerk, in the presence of the witnesses the signatures and seals being added as before.

An irregular Will was allowed by Justinian to parents in favour of their children. All that was required was that the names of the children should be written with the testator's own hand, and that the shares in which they were called to the inheritance should be expressed in words, and not in figures.

Nov. (cvii. 1).

In rural districts, where it might be difficult to obtain competent witnesses who could write, a special form of Will was permissible, in which the presence and signatures of five witnesses might suffice, and if only one or two of these could write, they might sign for the rest.

L. 31, C. (vi. 23).

Where the existence of a contagious disease prevented witnesses attending, it was not necessary for all the witnesses to be present at the same time. Witnesses actually suffering from the disease might attend and sign later on, but no relaxation as to the number of witnesses could be permitted.

L. 8, C. (vi. 23).

It will be seen from the above review that there were two breaches in the history of testamentary succession: one when the later form of the fictitious sale was introduced, which brought with it the secret Will, operating only at death; the other, the substitution of the various imperial Wills for the prætorian and civil law Wills in which the main attention was turned to securing, by the presence of a sufficient number of trustworthy witnesses, that the Will was deliberate and genuine.

(2) The Essential Conditions of a valid Will, and the duties of the heirs.

Besides, however, the mere external requirements which have been adverted to, there was a series of internal conditions which must be satisfied in order to make what purported to be a Will good and effectual in law. These latter conditions partly concerned the structure of the testamentary document itself, and partly the conduct of persons and the happening of events after the decease of the testator.

(2) The essential structural conditions of a valid Will were the following:

(*a*) The capacity of the testator.

(*b*) The institution of a competent heir or of competent heirs.

(*c*) Due attention to the claims of children and of near relations.

(*d*) The competency of witnesses and compliance with legal formalities.

After the testator's decease, the essential conditions to the validity of the will related to—

(*e*) The formal opening of the will.

(*f*) Entrance on the inheritance of an heir.

(*g*) Discharge of the heir's duties in the payment of (1) debts, (2) legacies, (3) and trust gifts (*fideicommissa*).

Akin to this last topic is the subject of codicils.

(*a*) The simple requirements for making a valid will were, that the testator should be a Roman citizen, should be of full age, should not be under any one's power, and should not be specially incapacitated either by physical or mental disease, or by the imputed legal incompetency which placed him under guardianship. There, were, besides, a number of peculiar grounds of disqualification, which were introduced from time to time, either by general policy or by legislation. Such were implication in seditious conspiracies, apostacy, heresy, incestuous L. 5, C. (ix. 8).

marriage connections, conviction for gross libels, and capital offences generally. Persons who were deaf and dumb could make Wills by special imperial permission.

D. (xxviii).

(*b*) The most indispensable of all the requirements of a Will was the appointment of a competent heir or heirs. It was said that the heir must be one who had the capacity of joining with the testator in making a Will (*testamenti factio*); but many persons could be appointed heirs who, at the time, could not make a Will. Thus, a testator might appoint a slave as his heir, who thereby became free. Such an one was sometimes appointed in order to save the estate, or, rather, the testator's credit, from nominal insolvency. The heir was obliged to enter on the inheritance, and the insolvency was then his, and not the testator's (*necessarius heres*). This was sometimes done in respect to children and descendants (*sui et necessarii heredes*), but the Prætor came to their relief, and saved them from the necessity of entering upon an overburdened inheritance.

Foreigners, apostates, heretics, and the sons of traitors could not be appointed. Municipal bodies and corporations generally could be appointed under the later law. Some persons were partially disqualified. Thus, the emperor could not be appointed for the sake of facilitating proceedings in an action. Parents and children incestuously connected could not appoint each other. A husband or wife by a second marriage could not receive more than had been left to a child of the first marriage. Natural children could only receive a twelfth share of the inheritance, if legitimate children survived.

In estimating the capacity of an heir, the time of making the will, the time of the death of the testator, and the time of entrance on the inheritance had all to be kept in view; but the state of things in the intermediate periods was irrelevant.

It was possible to appoint an heir conditionally, but not temporarily; and sometimes a succession of heirs was named, each of whom was only to inherit in case of the one preceding him on the list not entering on the

inheritance (*vulgaris substitutio*). Sometimes the testator determined who should be his son's heir if he died before he became of age yet after his parent's decease (*pupillaris substitutio*).

It was customary, in naming more heirs than one, to mark with great numerical precision the proportionate share of the inheritance which each heir was to take. It was always presumed in law that the testator had intended to dispose of the whole of his inheritance, according to the well-recognized maxim, "that one could not die partly testate and partly intestate." The usual mode of computation was to treat the inheritance as though it were a Roman *as*, made up of twelve parts or *unciæ*. An heir to the whole inheritance was called *heres ex asse;* to a third, fourth, or half-share, a *heres, ex quadrante, ex triente, ex semisse;* an heir to three-fourths, that is, to eight *unciæ, heres ex dodrante.* If the testator had so worded his will that there were more heirs than *unciæ*, which by this reckoning could be apportioned to them, or more parts than heirs, it was presumed that an equitable division was to be then made in accordance with the principles indicated by the testator for the shares expressly assigned. Thus, if necessary, the inheritance was regarded as made up of two *asses* instead of one, and divisible into twenty-four *unciæ* instead of twelve.

(*c*) Due attention to the claims of children and of near relations was secured by the recognition of two principles. One was that every one of a testator's children must, except in certain special cases, be either instituted as heirs or expressly disinherited; the other was that a certain moderate share of the estate should be left to the nearest relations.

The rule of either expressly instituting, or expressly disinheriting an heir, applied to posthumous and adopted children as well as to existing and natural-born children. Thus, a Will might be rendered invalid (*ruptum*) through the subsequent birth or adoption of a child not distinctly contemplated in the provisions of the Will. All children, male and female, had, in Justinian's time, to be disinherited

either by name or by clear individual designation. The only cases in which a testator might merely pass over children without mention, were those enumerated in the 115th Novell, and each of which, when applicable, had to be especially assigned in the body of the Will. The general ground in the case of parents' Wills was ingratitude, comprising such acts as personal violence to parents; implicating parents in a criminal charge; calumnious accusations against parents; refusing to free parents from prison; neglecting parents when insane; and deserting the orthodox religion. Children could pass over their parents where the parents had accused them of a capital offence other than high treason; where they had plotted against their children's lives; where they had neglected their children when insane, or had left them in captivity.

Nov. (cxv).

There was one case in which a testator was allowed to disinherit his child without express words. This was where a son was under age and his guardian could not be trusted, or where the son was insane or an acknowledged spendthrift. In certain cases of this sort the Prætor supported the Will, provided the children's interests, in the way of alimentary provision, were sufficiently regarded.

L. 18, D. (xxviii. 2).

A second requirement, in respect of the claims of relations, rendered a Will invalid on the ground of being *inofficiosum*, that is, if the nearest relations did not receive some proportion, however slight, of the whole estate.[1] The ground for impairing the validity of the Will was said to be the want of sane mind on the part of the testator.[2] The persons entitled under this rule were parents, and children or grandchildren, emancipated or not, and existing or posthumous; brothers of the whole or half-blood, as against heirs belonging to certain discreditable classes. The time of the existence of the relationship was that of the testator's death. According to the earlier law of Justinian, if any portion at all was left to the claimants, the Will was good, and their share was compulsorily made up

[1] § 3, J. (ii. 18). L. 30, C. (iii. 28). Nov. (xviii. 1). Nov. (cxv. 3, 4).

[2] D. (v. 2).

to a fourth part of the share they would severally have had in case of intestacy; but this was altered in the 18th Novell, by which it was enacted that if a father or mother left one, two, three, or four sons, they should receive a third share each of their presumable part of the inheritance on an intestacy. If there were more than four sons, half the inheritance was to be left them by equal distribution. Some controversy has arisen as to the interpretation of this law, according as its literal words are kept in view, or the policy of the older law is taken as the guide.

In estimating the property of the deceased for the purpose of calculating this so-called legitimate portion, the time of the testator's death was kept in view, and debts and funeral expenses are first deducted.

(*d*) The capacity of witnesses was referred to the time at which the Will was made, and if it was proved afterwards to have been defective, it did not vitiate the Will. Witnesses must be neither women, nor under age, nor slaves, nor deaf and dumb, nor interdicted from managing their own affairs, nor otherwise legally disqualified by way of judicial penalty. A witness must not be in the power of the testator, and neither an heir nor his father, in whose power he was, nor his brothers in the power of the same father could be witnesses to the will. It was generally said that witnesses must be specially summoned, but it was sufficient if they were present for some other purpose and freely took part in the proceedings. D. (xxii. 5).

A Will could be written on paper, or parchment, or wax; alterations, interlineations or erasures could be freely made without invalidating the document, D. (xxviii. 4). and if any obliteration occurred accidentally, the Will was read without reference to it. The test was whether the Will could be understood in one sense or another without resorting to extrinsic aids.

(*e*) The Formal Opening of the Will.

It was a recognized principle that a Will was a public document, and neither belonged to the testator nor his

heir, but to every one, especially to every one incidentally concerned in its contents.

It was customary, especially on occasions of travel, to have more copies than one of a Will, all duly witnessed and executed, of which one, however, was said to be "authentic."

After the time of the death, the proper guardian of the Will was the Prætor or provincial magistrate, to whom the person entrusted with it ought to bring it for proof and inspection by all persons interested. The Will was proved by the Prætor summoning as many of the witnesses as he could conveniently collect, making them acknowledge their seals, breaking the containing thread, opening the Will and reciting the contents, and finally re-sealing it with a public seal, previously to depositing it in a general registry, from which copies could always be obtained. The practice in the days of Paulus, with respect to Wills in provincial towns and districts, was for the opening and recitation of the Will to take place in the Forum or Basilica some time between the second and tenth hour of the day. A heavy penalty was inflicted on those who opened or recited a Will otherwise than as the law directed. The Will was to be opened immediately the testator died, and three or five days from the time the death was known was the longest period allowed to elapse. Heavy penalties were affixed by the Cornelian law to the offences of fraudulent fabrication, suppression, or mutilation of a Will; and these offences were committed by all persons who, being in possession of a Will, did not bring it to the light from some fraudulent design directed against the heirs or other persons interested in the Will.

Paul. Sent. (iv. 6).

Paul. Sent. (iv. 7).

(*f*) Entrance on the Inheritance.

According to the original and strictly logical conception of an heir, he so completely occupied the place of him to whose inheritance he succeeded, that there was no breach of continuity, and the heir took up all the rights and obligations of the deceased just at the point at which they

had been left. But it was obvious, as society became more complicated and industrial relationships extended, that serious inconvenience must follow from a rigid application of the principles. For instance, an heir might be rendered insolvent through precipitately entering on an overburdened inheritance. The private creditors of the heir might be suddenly disappointed of their proper securities through a sudden influx of unexpected liabilities. Relations might be called to the inheritance who had already received, during the lifetime of the deceased, more than a fair share of the testator's or intestate's property.

To meet these practical difficulties, a series of remedial measures was devised by the Prætors, which, in Justinian's time, had culminated in a recognized system, largely modifying the original character, duties, and rights of the heir. This system of relief may be considered under the four heads of—

(α) Provisions for deliberation as to entering on the inheritance.

(β) The right and duty of publicly investigating the accounts of the estate (*beneficium inventarii*).

(γ) The right of separating the personal claims and liabilities of the heir from the claims and liabilities arising only out of his position as heir.

(δ) The duty of bringing into contribution property acquired by an heir from a testator or an intestate in his lifetime.

(α) Persons under age were sufficiently protected against imprudent acquisition of a worthless or overburdened inheritance (*damnosa hereditas*) by the ordinary security afforded them, through the necessary acquiescence either of their parents, if alive, or their guardians of whatever class. Where, in spite of these precautions, an inheritance subsequently turned out fraught with loss, relief was still to be obtained in some cases by the Prætor's interposition, on the ground of "re-establishing a previous state of things" (*restitutio in integrum*). This last remedy was also applicable where an heir was induced to enter through force or fear.

No fixed time legally restricted the heir in deciding whether it were or were not worth his while to enter on the inheritance. But if the predecessor seemed to have been murdered by a member of his household, the heir could not enter until a public inquiry had taken place, in accordance with the *Senatus consultum Silanianum*. Where pressure was put upon the heir by persons concerned, he had to make a special application for time to deliberate. In such a case, the Prætor used to grant not more than one hundred days. Justinian allowed a judge to grant as much as nine months, and reserved to the emperor the right of granting a whole year. In this interval, the heir might inspect the accounts of the estate and, by help of a judge's order, turn into money perishable things, and make payments, which, for one reason or other, could not be properly deferred. His son, who was an expectant heir, might also be supported out of the estate. If the heir died without making up his mind, the right to deliberate, so far as the recognized period was not exhausted, passed to his heir. If the heir had not made up his mind at the close of the allotted time, he was held to have refused the inheritance, so far as the next claimant was concerned ; but to have incurred the liabilities attaching to it, so far as the creditors of it were concerned.

D. (xxix. 5).

Where, according to the older law, a relation was compulsorily made heir (*suus et necessarius heres*), the Prætor came to his relief by allowing him to abstain from entering on the inheritance (*beneficium abstinendi*). But this was only granted to persons of full age, in cases where they had not interfered with the estate, or, being under twenty-five years of age, had found the estate to be fraught with loss.

(β) The chief security afforded the heir was by means of the right accorded to him of making a public and official statement of the accounts of the estate (*beneficium inventarii*). It was to be undertaken within thirty days of the heir's becoming acquainted with the fact of his succession, and completed within another sixty days if the property was at hand, or within a year at the utmost from

the heir's first acquaintance with the fact of his succession. The statement or inventory had to be prepared in the presence of public clerks or accountants (*tabularii*), as well as the creditors of the estate, the legatees under the Will, and all other persons interested; or, in the absence of all such persons, in the presence of three witnesses of good repute.

The heir had to sign the statement of account with his own hand, or to have the accountant's signature affixed by his directions. If it should appear that the heir had abstracted anything in the interval, either directly or indirectly, he was liable to make it good to double the amount.

The heir obtained a series of advantages from this statement. He was incapable of being sued during the interval. He could enter on the inheritance without incurring any further liability than such as could be discharged out of the estate itself. He could charge on the available assets all needful expenses required for the funeral, the preparation of the inventory, and the proving of the Will. He could proceed at once to satisfy the creditors and legatees in the order they presented themselves, and had no further liabilities in respect of late comers. Lastly, he retained his own rights of action against the estate equally with the rest of the creditors.

If the heir neglected to take advantage of making an inventory, and preferred simply to apply for time to deliberate, he not only continued liable to the creditors of the estate to the full amount of their claims, but could not deduct from the legacies and gifts in trust the fourth portion which, by the Falcidian and other laws, he was entitled to retain for himself.

(γ) For the protection of creditors, the Prætor accorded to all creditors the right of applying to have the property which was included in the estate separated from the private property of the heir. This advantage could only be obtained so long as the inherited property had not become mixed up with other property of the heir, or, at least, mixed up beyond the possibility of discrimination;

and in no case beyond five years from the time of entrance on the inheritance. The effect of the separation was, that the private creditors of the heir could only be satisfied out of the testator's property after the creditors of the estate had been satisfied. If the estate was not sufficient to meet the liabilities upon it, the creditors who had sued for a separation of goods could not have recourse to the heir's private property in order to make up the unsatisfied portion of their claims.

(δ) Where, in consequence of the laws of succession, emancipated children and their heirs were called to the inheritance of their father's estate, either on an intestacy or in opposition to the terms of a will (*contra tabulas*), they were required, with a view to an equable redivision of the estate, to account for all the property they had received from their natural father in his lifetime, other than such as it might have been expected the father would have spent in the due discharge of his parental functions. The property so to be accounted for, or, in the terms of English law, brought into "hotch-pot," was such as dowry and gifts in view of marriage, and advances of money for purchasing posts in the army.

(*g*) Discharge of the Heir's Duties in making Payments of Various Sorts, including Legacies and Trust Gifts.

It has been already seen what provisions were made in Justinian's time for the protection of the interests of the creditors of an estate, devolving either on an intestacy or through the operation of a Will. But, besides the general duties incumbent on an heir of representing his predecessor in the discharge of his debts and current obligations, the Will, if there were one, usually cast upon him other classes of duties which vie with, or even exceed in importance, all the rest. These duties fall under the heads of legacies and trust gifts,—*fideicommissa*. It was only through the medium of one or other of these that individual persons, not included in the list of heirs, could

obtain any advantage under the Will. In fact, the institutions of legacies and trust gifts marked a serious invasion on the integrity of the principle of the genuine Roman Will; and the development of these institutions, in Justinian's time, by their more complete assimilation, marks the transition to the modern Will, in which a series of gifts of all sorts to individual persons entirely overshadows the functions of any one person who may still be designated the heir.

(3) Legacies.

A legacy was defined to be a gift made by the deceased; it was, in fact, a charge on the heir to make a payment to some person individually mentioned or described. By Justinian's time, all formal distinctions, by which different sorts of legacies were marked off from each other, had vanished; and no matter what words were used in the Will, legatees could avail themselves of personal actions against the heir and of real actions against other persons in following up their claims. Thus, in Justinian's time, the main question in respect of legacies was one of interpreting the language and intention of the testator; and provided the intention of the testator was clear, every effort was made to give effect to it as against the heir.

Thus, a testator might impose upon his heir the duty of purchasing an object belonging to another and presenting it to a legatee; but, in this case, the legatee must prove that the testator knew whom the thing belonged to, or at least that it was not the testator's own. If the legatee himself had purchased it, he could recover the price from the heir. If he became owner of it without giving an equivalent (*ex causa lucrativa*), he could not sue for its value. A legacy might comprise any thing or class of things which could be the subject of property at all, and this would include all the rights of action necessary to acquire its complete ownership.

A legacy might be made conditionally, or for a certain purpose, or to last a certain time, or (in Justinian's time) by way of penal condition imposed on the heir.

A legacy vested in the legatee from the date of the death of the testator, supposing that no condition deferred the date of vesting. The date of vesting was described by saying "*dies cedit.*" The day from which a legacy could be actually sued for, which could not be earlier than the entrance of the heir on the inheritance, was described by saying "*dies venit.*" The effect of the legacy having vested was, in the event of the legatee's death, that it passed to his heir; the individuality of the persons and the things concerned was determined with reference to that epoch; and the loss or injury of specific objects bequeathed attached to the legatee and no longer to the heir. The "Catonian rule" laid down that if a legacy was not good in law at the time the Will was made, supposing the deceased died immediately, it would not be good at the time that he really died.

D. (xxxiv. 7).

There was nothing to prevent a testator revoking a legacy by a later Will or a codicil, or introducing a new condition or a modification in the mode of charging the heir (*ademptio, translatio*).

Though the earliest forms of the Roman will left no opening for charges on the heir of the nature of legacies, yet by the time of the XII. Tables the practice of leaving legacies had become so common, that one of the laws contained in those tables expressly sanctioned it. It was found, indeed, by experience that, whether from vanity or other causes, testators acquired the habit of distributing their whole fortune in legacies at the expense of, and even to the ruin of, the heirs. Efforts were made to counteract this successively by the Furian, Voconian, and Falcidian laws.

By the Furian law, legatees, with the exception of certain near relations, were forbidden to receive more than one thousand asses each. But this law was evaded through the practice which arose of distributing the estate among a number of legatees, no one of whom was to receive more than the amount limited by law.

B.C. 183.

By the Voconian law, a legatee was forbidden to receive more than the heir or heirs. But here, again, by distributing the estate among a number of legatees the law was effectually evaded, so far as its main policy was concerned. B.C. 169.

The Falcidian law was more effectual. This law allowed an heir in all cases to retain at least one-fourth share of the portion of the inheritance directly devised to him by the testator, exempt from all charges by way of legacies. Thus, the testator could only dispose of three-fourths of his inheritance in legacies. If he endeavoured, through the wording of his Will, to dispose of a larger share than this by gifts to legatees, the share of each legatee had to abate in just proportion. The retention of the so-called "Falcidian portion" was allowed in favour of each heir, independently of the rest; and before deducting the portion in the heir's favour, a special valuation of the assets at the time of the testator's death had to be made for this purpose. The debts of the deceased, funeral expenses, and the value of slaves liberated by the Will, were so many deductions from the amount of the assets. If, between the time of the death and the entrance on the inheritance, the available assets so far decreased in value, or appeared so worthless, as to discourage the heir from entering, in spite of his right to retain a fourth of his presumable claims, he might yet make a special agreement with the legatees for a distribution of a more beneficial kind than that enforced by law.

The deduction in favour of the heir was extended by the Emperors Severus and Antoninus Pius to gifts made in contemplation of immediate death (*donatio mortis causa*) and to gifts between husband and wife. L. 27, D. (xxxix. 6). L. 32, § 1, D. (xxiv. 1).

Justinian, however, by his latest legislation, went a long way towards entirely abrogating the policy of the Falcidian law. He enacted that the testator could exclude his heir from the Falcidian portion by express words to that effect. The law says that the heir is to get his advantage rather by the mere fact of conscientious per-

formance of his duties than by positive gains, and that if he refuses to enter on the inheritance on these terms, it is to pass to substituted heirs, co-heirs, or even to legatees themselves, or slaves and intestate successors.

§ 2, Nov. (i. 2).

By a previous law, confirmed by the last mentioned law, Justinian had excluded from the benefit of the Falcidian law the heir who had neglected to make an inventory of the inheritance.

L. 22, § 14, C. (vi. 30).

An heir might exclude himself from the benefit of the Falcidian law either by express agreement with the deceased or by voluntary surrender of his claims, such as occasionally took place on the sale of an inheritance. A father might, furthermore, exclude his heir from receiving the Falcidian portion, either by expressly forbidding the alienation of a particular estate, or by giving in his lifetime to his heir a fourth portion as an express equivalent.[1] By Justinian's latest legislation, legacies for charitable or religious objects (*piæ causæ*) were not chargeable with the Falcidian portion.[2]

[1] D. (xxv. 2).

[2] Nov. (cxxxi. 12).

Trust Gifts (*fideicommissa*).

The practice had arisen in Rome some time before the reign of the Emperor Augustus of requesting heirs, by way of petition, suggestion, or exhortation, rather than of direct command, to make gifts to persons specified in the Will. It seems that this practice grew up contemporaneously with the use of informal and supplementary Wills, entitled codicils, by which testators, when away from home, were accustomed to impose duties on heirs already instituted by a Will which they had left behind them at a distance. These trust gifts were made in the form of a supplicatory request, as—"I beg," or "request you, my heir, after entering on my inheritance, to transfer it, or such and such a part of it, to such and such a person" (*rogo te ut restituas*). It was said to be the Emperor Augustus who first set the example of regarding a trust of this sort as absolutely binding on the heir, and of himself personally

conforming to a testator's wishes as a matter of strict legal obligation.

When the practice became settled, the same difficulty presented itself as in the case of legacies. Where the heir had to transfer the whole or the greater part of an inheritance, perhaps of small or doubtful value at the best, he was reluctant to enter, and the interests of everybody concerned in the execution of the Will suffered in consequence. A series of enactments, parallel to those resorted to in the case of legacies, were passed for the purpose of at once securing a due advantage under the Will, or even on an intestacy, to the heir and of inducing the heir to enter on the inheritance. This legislation comprised (1) *Senatus consultum Trebellianum* of Nero's reign, (2) the *Senatus consultum Pegasianum* of Vespasian's time, (3) a rescript of the Emperor Antoninus Pius, and (4) the amending and consolidating legislation of Justinian.

(1) By the *Senatus consultum Trebellianum*, on an inheritance being wholly transferred by the heir to the person designated by the trust under the Will (*fideicommissarius*), the benefit and the liability arising from actions at law passed with the inheritance, so that the heir was freed at once from all further responsibility. He was also, however, without any inducement to enter on the inheritance, as he received no advantage whatever from it.

(2) A further step was taken by the *Senatus consultum Pegasianum*, which, in all cases, allowed the heir to retain a fourth portion of his presumable share of the inheritance, calculated exactly in the same way as the Falcidian portion in case of legacies. Thus, where the heir under the Will retained at least a fourth of his inherited share, there was no occasion for applying the later enactment; the actions were distributed, under the *Senatus consultum Trebellianum*, proportionately between the heir and the trust beneficiary, according to their respective interests. But where the heir was not provided for sufficiently by the Will, the trust beneficiaries were treated for all purposes as legatees, and under the *Senatus consultum Pegasianum* the heir obtained his fourth portion. He could only be in-

duced to enter on an inheritance of doubtful value by making a special agreement with the beneficiary for a fair distribution of liabilities. Apart from such agreement, he was liable to sustain all the burdens himself. If, however, he refused to enter, the *senatus consultum* enabled the beneficiary to obtain an order from the Prætor that the heir should enter; and thereupon the actions were distributed under the *Senatus consultum Trebellianum*, but the heir retained nothing under the later enactment.

(3) The rescript of Antoninus Pius extended the benefit of the *Senatus consultum Pegasianum* to heirs on an intestacy, where trusts had been created by codicils.

L. 18, D. (xxxv. 2).

(4) Justinian consolidated and amended the whole law on the subject, and the result may be briefly described as follows. If the heir refused to enter on the inheritance, he could be judicially compelled, and in this case he took no benefit of any kind under the Will, and the liabilities of all sorts were transferred to the beneficiary. If the heir consented to enter without compulsion, he was entitled to retain a fourth part of his inheritance, while the profit and loss arising from actions were distributed between him and the beneficiary in ratable proportions.

Where, according to the wording of the Will, one or two specific things were left to the heir, and these included the amount of his fourth part, the heir was treated as a mere legatee, and the loss and profit arising from actions passed to the beneficiary; but inasmuch as the specific things so left to the heir might include the bulk of the inheritance, the beneficiary might have to make up his mind whether it was worth his while to have the inheritance transferred to him at the cost of having to incur its liabilities.

Codicils.

The Roman codicil was originally an informal and supplementary Will, which a testator made in circumstances in which he had a difficulty in making a new Will, for the purpose of imposing a trust charge on his heir. It seems

to have been the Emperor Augustus who, at the suggestion of the jurist Trebatius, first sanctioned this irregular form of disposition. The history of codicils was thus closely connected with that of testamentary trusts. In Justinian's time, a codicil required at least five witnesses to authenticate it. A codicil might impose a charge on an heir appointed by a previous Will, or even, in default of a Will, on the heir who was called in case of intestacy. The codicil might also have reference to a Will made subsequently, and it was sufficient for the confirmation of the codicil that the subsequent Will should not expressly revoke it.

L. ult., § 3, C. (vi. 36).

It was a general principle that an heir could not be directly appointed or disinherited by codicil; but much the same effect might practically be brought about by the device of charging the heir by codicil with the trust duty of transferring the whole inheritance to somebody else.

Before leaving the subject of Roman Wills and codicils, it may be convenient to sum up the expressions which were used by the Roman lawyers to indicate that a testamentary disposition was on one ground or another invalid. It was said to be—

(1) Null and void (*nullum*) where there was some defect in the matter of the institution of an heir, as by passing over children without express disinheritance, or where the testator's capacity was deficient.

(2) Inoperative for want of form (*injustum*), on the ground of not being made in accordance with the requisite formalities (*non rite et jure factum*).

(3) Revoked (*ruptum*) through a change of intention on the part of the testator, properly manifested, or by an increase in his family not contemplated by the Will. It will be seen that a Will might be null and void and also cancelled from one and the same cause.

(4) Invalidated (*irritum*) through a change of civil condition on the part of the testator, as by his arrogation into another household, or by his loss of liberty or citizenship,

or through no heir being forthcoming to enter on the inheritance. The last case covered the particular instance in which the heir refused to enter, when the Will was said to be abandoned (*destitutum*).

L. 1, D. (xxviii. 3).

(5) Cancelled (*recissum*), as on a judicial sentence in a suit founded on want of attention to the claims of nearest relations (*querela inofficiosa*).

It will be seen that, in the two first of these cases, the Will is invalid from the beginning. These cases were sometimes included under the head of "abortive" (*inutilia*). In the other cases, the Will is only invalidated either through subsequent events, or through subsequent events which, being first ambiguous, afterwards assume a decisive complexion.

CHAPTER VI.

ACTIONS AND REMEDIAL PROCESSES.

THERE is no part of the law of a country which is more closely associated with its historical fortunes from a social point of view than that of procedure. The fact that it lives more than any other part of the law in the eyes of the people, and fixes upon itself all the emotions of interest, sympathy, antipathy, and curiosity, at once renders it obstinately repulsive to change, and renders the changes which inevitably take place slow and gradual. It rarely happens that there is any great breach of continuity, and the invariable experience is that the latest refinements of jurisdiction preserve, at the least, some few lineaments of the most antique condition of the society.

Nothing can be more different than the circumstances of early Rome as a strictly self-contained community and city, in which the primitive law grew up, from the situation of the empire, with its two great metropolitan capitals, its scattered provinces, and its innumerable quasi-independent municipalities, under Constantine the Great, and the position, again, of the still more widely developed and reunited empire under Justinian. The differences are, indeed, represented to the full on the most superficial survey of the methods of judicial procedure in the time of the early republic and in the time of the later empire.

Nevertheless, it is difficult to fix any particular moments at which momentous changes were brought about. The date, indeed, of the Æbutian law (B.C. 172)—which is said to have abolished the antique civil processes (*legis actiones*)

and introduced the Formulary system of pleading, with its attendant distribution of jurisdiction between the magistrate and the jurors—might be taken as indicating a notable epoch of change. Similarly, the final legislative abolition of the Formulary system by Diocletian and Constantine (A.D. 294-342) seems to mark an epoch of corresponding importance and distinctness. The extensive legislation, again, of Justinian, for the reform of judicial proceedings, might also seem to imply radical change rather than organic renovation.

But it will be found, on a closer inspection, that in each case the old contained the actually germinating seeds of the new. The old drapery of custom, routine, and often useless fiction, was dropping off long before the final legislative disrobement. In the process alluded to by Gaius as "demand for the appointment of a judge" (*judicis postulatio*), and only not preserved at full length owing to the corrupt state of the Verona manuscript, there was contained the obvious anticipation and promise of the whole Formulary system, of the subsequent proceedings which attended the grant of the Prætor's interdict, and even the provision for excepted cases made by Justinian, who otherwise rigidly confined to one supervising judge the whole conduct of judicial process (*extraordinaria cognitio*).

In the same way there were some judicial institutions which reappear in every age, though with changed names, and sometimes with modified details in the modes of their practical application. Such were the pains always taken to bring the defendant before the court in person, and not only to furnish him with all requisite information as to the ground of the suit, but also to afford him the fullest opportunity of settling it in a reasonable time without further litigation. So, likewise, the practice of judicial bail in all its forms, whether by giving personal security, material pledge, solemn oath, or even, as in the earliest times, the deposit of a wager, exhibits merely fluctuating forms of one and the same ineradicable notion. Justinian only carried the institution to the last point of

development when he exempted persons occupying certain honourable stations from the necessity of giving guarantees for attendance in court (*vadimonia*), other than the pledging of their personal honour.

It is not to the present purpose to follow out this course of inquiry with the interesting minuteness which it would admit of. Sufficient has been said to explain why it is impossible to isolate any one era of legal procedure, or to attempt to give even a compendious description of the judicial institutions of Justinian, without recurring to the antiquated curiosities of the XII. Tables, as well as to the active period of the Prætor's interdict as witnessed by Cicero.

It will be convenient to consider the several topics here indicated in the following order:

§ 1.—*Growth of Roman Procedure up to the Age of Justinian.*

(1) The antique civil processes (*legis actiones*).
(2) The Formulary system of pleading.
(3) The summary jurisdiction of the Prætor.
(*a*) Interdicts.
(*b*) Judicial security (*cautiones*).
(*c*) Grant of provisional possession (*missiones*).
(*d*) Reinstatement (*restitutio in integrum*).
(*e*) Administrative functions of a judicial kind reserved to the Prætor or his representative.

(1) The Antique Civil Processes (*legis actiones*).

An account of the antique civil processes is contained in the fourth commentary of Gaius' Institutes, though, unfortunately, some of the most relevant passages are illegible in the only surviving manuscripts. The

list which Gaius gives contains five processes. They are:—

(*a*) That *sacramento.*
(*b*) „ *per judicis postulationem.*
(*c*) „ *per condictionem.*
(*d*) „ *per manus injectionem.*
(*e*) „ *per pignoris capionem.*

(*a*) The process called *sacramento* involved the deposit by both parties with the pontifex of a penal sum in proportion to the value of the matter in dispute; except where the matter in dispute was personal freedom, when the penal sum waged was limited to fifty asses. The wager (*sacramentum*) was forfeited, in the case of the losing party, to the State. The object of the deposit was to secure the *bona fides* of the parties and to maintain their persistence in the suit. The forfeited sum was employed to meet the expenses of the public sacrifices, and this was the origin of the name. Instead of an actual deposit, it became, later on, the custom for both parties merely to give security (*prædes* = *præ-vades*) for the penal sum to the Prætor. The whole proceedings, as detailed by Gaius, were in the highest degree symbolical, formal, and precise. Provision was made, as in the later process on the possessory interdict, for determining the provisional claim to possession.

(*b*) As to the process *per judicis postulationem*, of which the account is wholly lost through the state of Gaius' manuscript, it can only be conjectured that it was the remedy applicable in such cases as those of marking boundaries, determining family claims, preventing injuries through the facts of neighbourhood, and deciding cases where spurious possession had been obtained of a thing claimed. This process was presupposed in the legislation of the XII. Tables, and was an anticipation of the ordinary reference by the magistrate to the judge, under the Formulary system, as well as of the important class of agreements for referring matters to arbitration, which subsisted to the latest period of the law.

(*c*) Not much more information is contained of the

process called *condictio.* It was said to be named from the fact that the plaintiff was entitled to summon the defendant to have the matter in dispute referred to a judge at thirty days' date. Gaius himself says that it was not known in his day why this process was needed as well as the "sacramental" one. It certainly was not co-extensive with the later *condictio,* which was the usual personal action in the case of all obligations. The older *condictio* would seem to have been limited to money or a material thing, the amount or identity of which was ascertained at the time of bringing the action; and it would also seem that the *sacramental* process was restricted to suits for the ownership or possession of land, or for the determination of claims involving status or family rights.

(*d* and *e*) The processes *per manus injectionem* and *per pignoris capionem* were rather executive than litigious. The former was available as a sort of sequel to previous proceedings, or in a few limited cases prescribed by special laws, where a more energetic remedy than usually necessary seemed required in order to secure obedience to the law. Thus, the XII. Tables regulated the cases in which personal aggression might be used, in order to bring before the court a defendant who had already failed to comply with a judicial sentence. Other laws gave a similar right of enforcing attendance, as against delinquents in their duties to their sureties, and to persons taking as legatees more than they were, by the general law, entitled to abstract from the heir. The severity and irregularity involved in the process were gradually corrected, first, by allowing the defendant to resist the seizure on condition of putting in an instant appearance, and afterwards by substituting the guarantee of a personal or real security (*judicatum solvi*) given to the magistrate.

The process *per pignoris capionem,* which allowed a pledge to be seized by a plaintiff as security for his claim, was recognized partly by customary law and partly by express legislation of the XII. Tables. The cases, however, in which this sort of "distraint" without magisterial interposition was permissible, were limited in number and

strictly defined ; thus, by custom, the soldier could distrain for his pay or for money or provender for his war horse. By express law, the seller of a victim, or the hirer out of a beast of burden, employed to raise money for a sacrifice, could distrain for unpaid money due on the several contracts.

It is noticeable, and had not escaped the attention of such a legal antiquarian as Gaius, that in this list of civil processes there are somewhat indiscriminately blended together the most formal judicial inquiries, merely interlocutory or summary proceedings, and purely executive remedies. Such facts do not point so much to any retardation of social and political growth, because the remedies, roughly enumerated, really include most of what are required for an advanced industrial society ; but they bespeak a marked backwardness in the development of legal consciousness, owing to the non-existence of a large class of professional lawyers, the want of a legal literature based on an accumulation of forensic experience, and the absence of all division of labour, not only between the bench and the bar, but also between different classes of persons concerned in jointly administering the law.

In such a state of things, society has hardly got over the stage in which litigants can only be persuaded with the utmost difficulty to refer their disputes to a recognized public authority. They still experience much hesitation in confiding in the capacity and good-will of any such authority, and their confidence has to be eked out by an appeal to the imagination, such as is contained in symbolical mechanism, or else based upon the gross material security of a wager or pledge.

In two cases it was said that these antique civil processes lingered on to the age of Gaius, though the fact was rather an antiquarian curiosity than of practical significance. It was said that in the case of apprehended damage (*damnum infectum*), and in cases coming before the court of the *centumviri*, it was still in Gaius' time allowable to resort to the old legal wager of the *sacramentum*. In the case of apprehended damage, however, the Prætor had long pro-

vided a far more efficient remedy by requiring the person who threatened damage to his neighbour to enter upon a stipulation that, if he carried out the work which threatened injury, he would make pecuniary compensation. An action could then be founded on the stipulation.

The *centumviri*, which originally consisted of one hundred and five judges, to make up whom each of the thirty-five tribes equally contributed, was the oldest and most durable Roman tribunal. It was usually distributed into three or four distinct courts, and had referred to it by the Prætor all the questions of fact, or of fact and law combined, which related to family rights, succession rights, and such questions of the older Roman law as concerned Roman citizens exclusively. The device which was suspended over their court room was that of a spear, as pointing probably to the rough modes of acquisition alone recognized in the early state of society. It was thus natural that, if anywhere, the old civil processes should find a last resting-place here.

(2) The Formulary System of Pleading.

There were many causes which combined to bring the old civil processes into disuse, by gradually substituting others more suitable to the wants of the day and of a less formal and ceremonial character. It is intimated, indeed, by the historians, that the superintendence of judicial procedure was, during the early days of the republic, abused to political purposes through attaching mystery and secresy to the forms of action alone appropriate in the several cases which presented themselves.

But apart from this political abuse, against which there was a notable and successful reaction, a darkening spirit of technicality and needless preciseness always creeps over the use of long venerated forms, and society must either energetically burst its bonds, or collapse in stagnation and decay. The plebeian revolution effected one part of the needed reform, and the office of the Prætor, especially of the Prætor Peregrinus, who had to deal with foreigners in

their relations with each other, and with Roman citizens, completed the task of legal innovation. The antique civil processes were transformed into the Formulary system of pleading, and the change was signified by the Æbutian law of about B.C. 172.

The Formulary system was based on a distribution of the task of adjudication between an executive magistrate who, under the republic, was a Prætor, and other subordinate judges. To the Prætor belonged the duty of deciding whether there was *primâ facie* good ground for an action; and this decision could only be come to after hearing a provisional statement of the case from the points of view of the plaintiff and defendant severally, and, on recurring to precedent, making up his mind whether, in the case of either class of assertions being supported by the real facts of the case, and by the state of the law appealed to, the claim or the defence fell within a class for which customary judicial provision was made. This statement, in a brief and sententious form, of the class of facts and arguments on which the parties were prepared to rely severally constituted the first part of the proceedings. Naturally, they soon took a traditional and almost ritualistic form, being reiterated over and over again for the several cases which presented themselves with only variations of names and dates, and, though originally oral, were probably tabulated in official records.

This first half of the proceedings was said to be *in jure*, and was supposed to take place altogether in the personal presence of the magistrate; though, of course, his presence was only needed at occasional moments, for the purpose of testing the regularity and summing up the result of the proceedings. The close of this preliminary pleading was a marked event in the whole trial; it was called the *litis contestatio*, and implied that the parties had assumed a new and definite relation to each other. For instance, this constituted a period at which prescription was held to be interrupted, and from which fruits and accessions were reckoned in favour of the winner of the cause.

The next stage was the reference to a judge who might

be either one who belonged to the select class of qualified judges, about the constitution of whom from the ranks of senators, or of the *equites*, so much dispute occurred in the later days of the republic; or some or more of the class called *recuperatores*, who seemed to have been selected for a less important class of causes, and originally were employed solely in cases where foreigners were concerned; or the *centumviri*, already described.

The actual judge, or judges, were chosen by the presiding magistrate, but usually it would appear that the parties themselves were consulted, and if they could agree their wishes were deferred to. The pleadings, which were laid before the judge or judges, contained little more than a formal announcement of the class of facts and the head of the law on which the parties severally rested their case. The magisterial directions no further bound the judges than in so far as it required them to find for one side or the other, and to evaluate the damages, if necessary, in accordance with what proved to be the amount of success with which either party made out his case.

Thus the judges did not resemble English jurors in being confined to questions of fact as contrasted with questions of law. The Roman judges had to decide not only upon matters of evidence, but upon matters of law, that is, of the applicability of the law cited by litigants as being in favour of the case of either of them. The magistrate only went so far as to recognize that the claim and defence in point of law and of fact were presumably tenable and in accordance with recognized principles of adjudication. The detailed questions of fact and of law and, what is most difficult of all, of the immersion of the law in particular states of fact, were entirely left to the judge. The helps which the judge had at hand for conducting the inquiry, the class of evidence to which he was restricted, and the formalities and practical arrangements attending the whole course of the investigation, will be best gathered from the most highly developed form of them in Justinian's time, to be recounted further on.

The topic or ground of the plaintiff's defence was, in

the course of preparing the proceedings, woven into the body of the Formula in such a way as to make that document an integral whole, and to admit of it being read throughout as a continuous statement of the argument between the parties; thus, the plaintiff's answer (*exceptio*) would take the form of qualifying or restricting or conditionally denying the plaintiff's claim.

If the answer, for instance, were grounded on an allegation of fraud, the defendant's plea would appear in the form "if in that matter the plaintiff has not been guilty of fraud"; if the plea rested on some subsidiary agreement, the words would be such as, "if between plaintiff and defendant it appears that no special agreement was made that the plaintiff in such and such a case should not be sued." Some pleas were held to be perpetual and peremptory, others temporary or dilatory. To the former class belong pleas grounded on fraud or subsidiary agreements that the claims should never be made in such circumstances as the present ones. Dilatory pleas were those which merely related to the particular tribunal selected, the period within which the action was brought, or the fact of a person—not authorized thereto—suing by means of an agent.

The plea might similarly be answered provisionally by a like qualifying paragraph alleged in the plaintiff's favour, and carrying on the continuity of the general statement; the plaintiff's reply of this sort was called *replicatio*, and to this there might be fresh answer (*duplicatio*), and, again, a fresh affirmation by the plaintiff styled *triplicatio*, and so on.

It has always been held there existed some reservoir or treasury of Formulæ which was limited in extent, and which was in the exclusive control of the Prætor. The existence of such a material repertory is probably imaginary, but the Prætor was necessarily restricted in a variety of directions when requested to grant a right of action, and in accordance with such a grant to furnish the requisite Formula for the statement of the case in a way harmonious to recognized legal principles. These limitations on the

Prætor's absolute freedom proceeded partly from the legal sources from which alone rights of action could be drawn, partly from the quality of the remedies which were alone appropriate in a given case, and partly from the nature and extent of the right alleged to be invaded. The result of these practical limitations is seen in the classification of Formulæ, and, still more, in that of the actions for the use of which they were the available instruments.

Thus, Formula were said to be either conceived—

in jus—that is, in view of a pure point of law.
in factum—in view of a pure question of fact.
in jus et in factum—in view of law and fact combined, which was the commonest case.

So, again, the Formula was classified according to the form in which the damages were estimated, according as they were to be a fixed liquidated sum, or a sum at present uncertain but capable of being ascertained afterwards. In the last case a superior limit might be put to the damages (*cum tavatione duntaxat* X *millia*), or it might be made to depend on the amount of the plaintiff's interest proved to be involved (*quanti ea res est*). It was considered a gross irregularity for a plaintiff to make, through negligence, a greater claim than he was entitled to make. He might do this by asking for more than he ought, or at too early a date, or in a place favourable to himself but unfavourable to the defendant, or by neglecting some essential condition which was in the defendant's favour.

A law of the Emperor Zeno's provided that wards should not suffer through irregularities of this sort committed by their guardians in the course of pressing their claims. Justinian awarded the general penalty of three-fold damages against the plaintiff who was proved to have prejudiced the defendant by undue claims; and in the special case of claiming the sum before it was due, the plaintiff making the claim was obliged to wait for an equal time after it was due without receiving interest, and even then he could only recover his just debts on first compensating the defendant for all loss and inconvenience he had occasioned. C. (iii. 10).

The classification of rights of action, which spontaneously developed itself with the emergencies which gave rise to them may be described with sufficient clearness by a simple enumeration of the chief grounds of distribution.

Actions were distributed :—

(*a*) With respect to the nature and extent of the rights on behalf of which they could be resorted to.

(α) *In rem*, as vindications (*vindicationes*) for the acquisition by the owner of his material thing illegally withheld from him ; and *actiones præjudiciales* for settling a question of personal status. The expression, *in rem*, is usually translated, "as against all the world." It seems to have arisen from the fact that no one person was originally liable to the plaintiff more than another, and it was the thing or matter which was of permanent concern, while the personality of the defendant was only casual through an ephemeral connection with this thing as detaining it, injuring it, or laying claim to it.

(β) *In personam*, as *condictiones*. Ordinary actions in the case of obligations. They presupposed a subsisting tie, link, or legal relationship between the plaintiff and the defendant.

(γ) *Mixtæ*. Combining the attributes of both the other classes of action, as the action (*familiæ erciscundæ*) for settling rival family claims to inherited property.

(*b*) With respect to the quality and extent of the remedy.

(α) *Rei persequendæ causa*. For the sake of recovering some material object in its integral identity, or its equivalent liquidated value in money.

(β) *Pœnæ persequendæ causa ;* where the damages are confessedly double, treble, or fourfold the worth of the thing at stake, and the whole of the damages are held to be penal.

(γ) *Mixtæ ;* where the damages are merely increased in a specified proportion, the access alone being penal. As in suing on a deposit, double damages were allowed.

(*c*) With reference to the legal quarters or sources from which the remedy was drawn.

(α) *Civiles* or *legitimæ.* Actions based on the common law or on statute.

(β) *Honorariæ.* Actions based on the edict of a yearly magistrate, as the Prætor or the Ædile.

(*d*) The same grounds gave rise to a corresponding division of actions into—

(α) *Temporales.* Those which only lasted for the year of office of the magistrate on whose edict they were based, and—

(β) *Perpetuæ.* Those which had no limits of time, except those fixed by the general laws of prescription.

(*e*) With reference to the technical validity of the right in pursuit of which they were claimed.

(α) *Directæ, contrariæ.* Those founded upon a well-recognized legal right.

(β) *Utiles.* Those founded on a right which the Prætor supported on the ground of its being analogous to a well-recognized right, such as the *actio Publiciana* accorded to one who lost possession before the period of *usucapion* was completed, as against all but the real owner.

(γ) *In factum.* Founded upon a right recognized by the Prætor as being in accordance with the spirit, rather than the letter of the common or written law. Such action was accorded in executing the Aquilian law, when a person so far from injuring another person's slave set him at liberty, and so only injured his master.

(*f*) With respect to the latitude of discretion allowed to the judge.

(α) *Stricti juris.* Where no discretion was allowed to the judge, and either the close language of the law or the express engagement of the parties prescribed the form and extent of the remedy.

(β) *Bonæ fidei.* Where some moral relationship, as that of guardianship or marriage, was involved, or where a contract was of such daily use as not to brook being constantly re-expressed in precise terms. To this last class belonged all the consensual contracts of sale, hiring, mandate, and partnership. In these cases the judge was required to take into consideration pleas of set-off to the fullest extent, to

make allowance for the good faith of the parties, or to expose bad faith and to assess the damages with regard to the equitable requirements of the whole case.

(γ) *Arbitrariæ*,—actions in which the parties acquiesced in the appointment of the judge, or chose him themselves, and in which the judge, as an alternative to assessing damages, gave the defendant the choice of doing some positive act in compliance with the plaintiff's claim.

Besides these actions as here classified and enumerated, there were a number of other well-recognized forms of action belonging generally to the class of *utilis* and *in factum*, that is, founded on rights rather analogous to, than identical with, strict legal rights, and which were often known by the name of the Prætor who first allowed them.

Such were—

The *actio Publiciana*, already alluded to for the recovery of possession by one in the course of completing his period of *usucapion*.

Actio Serviana, for recovering from a *colonus* or tenant farmer or others things pledged by the farmer as security for rent.

Actio quasi-Serviana,—a similar action awarded to an ordinary creditor for things specially hypothecated. These last two actions were also called *hypothecariæ*.

Actio Pauliana,—the action allowed to a creditor on the wrongful alienation of a debtor's assets.

Similarly, a number of actions were known simply by a name recalling the nature of the right or the quality of the remedy. Such were the *recessoria actio*, for cutting off a right of *usucapion* acquired through the completion of the period of prescription which had accidentally elapsed during the owner's unavoidable absence from home, as for instance, on public State business; the *actio noxalis*, for obtaining the transfer of a slave who had committed a personal injury, sued for by the sufferer as an alternative, at the master's option, to pecuniary amends; the action *quod metus causa*, for cancelling a business which had been transacted under a sense of constraint; *de constitutâ pecuniâ*,

for money simply promised without formal agreement to that effect; and the familiar actions, elsewhere described as *de peculio, de in rem verso, exercitoria, institoria* and *tributoria.*

(3) The Summary Jurisdiction of the Prætor.

The growth of the Formulary system, as above described, was a product of a clearer distinction between the function of administration and jurisdiction in the settlement of litigated claims. In the earliest phase of social life there is but one officer and court to investigate cases of illegality, to adjudicate upon them, and to secure compensation to the party injured, or at least to do what can be done to repair the breach caused by the infraction of a law. There is but one hand held over the heads of offenders as at once setting right what is wrong and awarding penalties. The most that can be achieved in the struggle for social order is to secure that a public official shall intervene to stay the personal struggles between rival claimants; and little time or space is afforded to prolonged inquiries into where the right lies or how the remedy can be most finely and most accurately adjusted.

Thus, in early Rome, the Prætor who was charged with the administration of justice was, in fact, mainly an executive officer of State. He succeeded to a large portion of the kingly functions, and especially to all those which were not of a military description. He had above all, and he retained in successive ages, the *imperium*, or right of absolute command, capable of being enforced by the sword, which was also the emblem of his office, and the attending lictors who, with their fasces, represented to the people the public force and authority which they were entitled to use in the execution of their master's behests.

The progress of the Formulary system marked the gradual withdrawal from the region of arbitrary decision to that of slow and deliberate investigation of all the matters of litigation which were becoming of ever increas-

ing importance. But it has been seen that the purely executive right and authority of the Prætor was only dormant, and was always capable of being called afresh into active exercise, according as the requirements of litigation in special cases called for it. The publication of the Prætor's Edict year by year did not of itself imply any practice of recurrence to the use of arbitrary rule. Indeed, the regular form which the edict gradually assumed, and the recognized duty (the infraction of which in the case of Verres was condemned by Cicero) of making the publication at the outset of the year of office, were facts which of themselves implied a desire for uniformity and regularity of process, and not for exceptional or casual exercise of mere power.

Nevertheless, the vicissitudes of jurisdiction, as disclosed by the common facts of a widening social life, repeatedly called for the supreme judicial authority to interpose with greater alacrity and decisiveness than were compatible with the tardy progress of a judicial suit. For these emergencies the Prætor retained and constantly exerted the right of interposing to prevent lawlessness and to further the interests of justice, though the principles of such interposition were themselves gradually reduced to order and brought within the range of well-recognized principles and methods. There were four cases in which the Prætor habitually intervened in the way here described:—

(*a*) That of issuing an interdict or interlocutory order of the nature of an absolute command.

(*b*) That of exacting security from parties to a litigation.

(*c*) That of according provisional possession.

(*d*) That of reinstating in their original legal position and relationships persons who had lost it on grounds which seemed to call for special indulgence.

(*a*) Interdicts.

The interdict—which, in Justinian's time, had become absorbed in the ordinary process of the *extra-ordinaria*

cognitio, in which the presiding magistrate decided the whole cause without reference to any judge but himself —probably owed its origin to the necessity of absolutely preventing invasions of public property and the disturbance of public rights. A large class of interdicts continued, throughout the history of this institution, to be concerned with nothing else than the prevention of this class of injuries to the public. The Prætor seems in his edict to have charged himself with the protection of places of public resort, sacred buildings, public streams and navigable rivers and their banks, and reservoirs of water and public drains. The Prætor's interdict was at first probably nothing more than a peremptory command proceeding from himself, in the exercise of his purely magisterial office, to a tresspasser or one who threatened a trespass, in which some public object of these sorts was directly or indirectly concerned. Thus, the interdict not only forbade a direct trespass, but also forbade any interference with those who were in the legitimate use or occupation of public property, or with those whose duty it was to repair and to watch over it.

This function of the Prætor, which so far belongs to public rather than to private law, except in so far as private rights were indirectly assailed or overridden, was progressively extended to other matters where purely private rights were concerned, but in which the same peremptory activity of the magistrate seemed equally called for. Thus, it was only one step further when, for the purpose of a pending or threatened litigation, the Prætor required one who detained a Will or other pertinent documents to produce it (*interdictum de tabulis exhibendis*). So, likewise, the protection of private rights of way, of water, and of property absolutely secured by custom on the mere payment of an annual rent (*interdictum de superficiebus*), naturally followed the precedent set by analagous public interests. The well-known possessory interdicts, by which the Prætor intervened to prevent a violent struggle between competing claimants and to enforce a suspension of the

D. (xliii. 5).

D. (xliii. 18).

dispute during a proper judicial inquiry into the question of right present a still more signal proof of the public grounds on which the otherwise arbitrary practice of issuing interdicts rested.

There were two interdicts which should have an especial interest for Englishmen, as they possibly supplied to the early English lawyers and clerical guardians of the king's writs the precedent for the writ of *Habeas Corpus*. These interdicts were those mentioned in the Prætor's Edict under the several heads as *de homine libero exhibendo*, and *de liberis exhibendis, item ducendis*. The former of these interdicts was said to be granted for the sake of protecting liberty, that is, to prevent free persons being kept in detention by any one. The act enforced by the operation of the interdict is said to be that of "producing in public and affording facilities for seeing and handling the person detained." For to exhibit, it was said, is to bring out of secret confinement (*extra secretum habere*). The interdict could be obtained by any one in favour of another, for "no one should be prevented from protecting liberty;" and the only question raised was whether the person detained was or was not free. In the case of the other interdict for producing a person really subject to the power of another, the operation was absolute, and no cause could be shown in favour of detention, as in the former case.

D. (xliii. 29, 30).

L. 3, § 8, D. (xliii. 29).

A certain analogy between a Roman interdict and an English injunction has led to a misconception in many quarters of the true nature of the Roman interdict, when applied in a case of litigation between private persons. The interdict in this case was not attended, like the English injunction, with any penalty for disobedience, other than that of allowing an action at law to take its natural course instead of being cut short at once in a way which might be in the highest degree satisfactory to both parties.

The interdict commanded the defendant, on the plaintiff's application and a *primâ facie* hearing of both sides, to comply with the plaintiff's demand, perhaps in a somewhat modified form. If within the limited time the

defendant complied with the order, the case was at an end. If he refused to comply, an action at law was commenced in the ordinary way, in which the demand of the plaintiff was based upon the Prætor's interdict, and had for its sole object the defendant's compliance with it. In the case of what was called a "prohibitory interdict," each party was required to make a formal promise to pay a sum equivalent to the interest at stake, in case he lost the action (*sponsio, repromissio*); and the course the proceedings practically took was that of ascertaining which party had to make good this payment to the other. In the case of all but prohibitory interdicts, the defendant had the alternative, in the place of giving his security or promise, to consent to have the matter referred to an arbitrator, who should prescribe what should be done by the defendant, in default of doing which alone he was liable to pay liquidated damages, assigned by the arbitrator. Thus, a judicial inquiry took place as to the whole rights on both sides, and as to the suitability and legal applicability of the peremptory remedy in the first instance provided by the Prætor's interdict. It was in the course of trials arising out of interdicts that some of Cicero's leading speeches were delivered.

In the case of "possessory interdicts" (*uti possidetis* for immoveables and *utrubi* for movables), it sometimes became requisite for the Prætor to determine the question of provisional possession during the ulterior course of the investigation. Two principles were in use for this case: one was that of wholly ignoring the possession, however legally authorized in all other respects, which had been obtained by violence, and replacing in possession a person thus violently extruded; the other was applicable where there were intermediate fruits, proceeds, or income to be acquired by the possessor, and the Prætor gave these proceeds to the claimant who, at a sort of auction, offered most for them (*licitatio fructus*). The possession was held to accompany the enjoyment of the intermediate proceeds. If the person who succeeded in obtaining possession in this way won the cause, he was entitled to be repaid the price he had advanced; if the excluded person won, he was

entitled not only to be put in possession, but, as a mode of fine on his antagonist, to receive in addition a sum equivalent to the price advanced by himself. It will thus be seen that in the case of possessory interdicts there was a series of distinct judicial questions involved. There was, first, the question of rightful possession at the moment, that is, of possession not obtained by violence; secondly, that of the right of possession grounded on ownership or some good possessory title, as that of a mortgagee or hirer; and, thirdly, the question of the claim to intermediate proceeds.

Gaius 166-168.

(*b*) Judicial Security (*Cautiones*).

The summary powers in the hands of the Prætor were exercised in the exaction of security, both in the course of a pending action at law and on a mere *ex parte* process which might or might not develop into actual litigation. The ordinary case in which the Prætor intervened in this way was where the integrity of some existing right was endangered, though not yet violated, and in which it was necessary to secure an interested person against the consequences of damage which the person who occasioned them might, at a future time, be unable to make good. One familiar cause for requiring security of this sort was where proceedings were initiated by a representative or *procurator*, in which case the representative had to give security, proportioned in amount to the sum at stake, that the costs or damages following on an unsuccessful suit would be duly paid. The same class of security was required where the representative appeared in the character of a trustee, guardian, or agent acting under a general mandate, unless the fact of agency was publicly registered (*actis insinuatum*), or the principal himself appeared and gave security that he would ratify the acts of his agent (*ratam rem dominum habiturum*).

In Justinian's time, a defendant could not be compelled at the outset of an action, if he personally appeared, to give security for costs and damages. At the most he

could, unless he belonged to one of the privileged classes, be required to make an oath before the magistrate or a stipulatory promise that he would not desert the cause before it had reached its natural termination.

The most frequent occasion for requiring judicial security was where a person apprehended danger from his neighbour's acts and the Prætor held any delay to be so hazardous that he consented to intervene and require the neighbour to give personal security or pledges by a certain day that he would abstain from inflicting the injury.

The securities required by the Prætor might take a variety of forms, according to the value of the interest at stake, the apparent solvency and good faith of the person from whom it was exacted, or his personal claims to exceptional privileges. The security might be that of a mere formal promise, forming one side of what was called a prætorian stipulation, or a promise accompanied by oath or personal security, attended with the intervention of sureties or the deposit of a material pledge. Where security would otherwise be required from the public treasury or a municipality a mere formal engagement was sufficient, as no doubt could be entertained of their general solvency.

D. (xlvi. 5).

L. 9, D. (xxxvi. 3).

(*c*) GRANT OF PROVISIONAL POSSESSION (*Missiones*).

One useful instrument of summary jurisdiction in the hands of the Prætor was that of according provisional possession to persons whose rights were likely to be seriously prejudiced through a delay occasioned by the acts or omissions of others or through unavoidable accident. To this head belonged the practice of according to a mother of a child not yet born, during the period which intervened before its birth, possession of an estate passing by succession on a death. For this purpose it was necessary that the birth should be expected on good grounds both at the time of the death and the time of entrance on the possession (*ventris in possessionem missio*). To the same general head

D. (xxxvi. 9).

belonged the possession known as that granted under the *edictum carbonianum*, in which possession was given to a child under age, whose true civil status was matter of judicial controversy, and could not be settled till he became of age. This possession was only accorded in the case of intestate succession allowed in defiance of a testator's will. The case might occur of it being controverted whether a posthumous heir had or had not, according to the proper interpretation of the will, been disinherited ; and it was held unfair to prejudice the claims of one under age by deciding against him peremptorily while only defended by a guardian.

This sort of provisional possession was largely resorted to for the purpose of merely obtaining effective security. Thus, where a debtor was supposed to be fraudulently hiding himself, or otherwise wasting or wrongfully disposing of his assets, the Prætor would give provisional possession to any creditor who applied for it and made out a *primâ facie* claim to it. The possession might reach either to the whole of the debtor's property or to specific things.

A frequent case for which the Prætor made special provision in his edict was that of putting a suitor into provisional possession of the matter in controversy when his opponent, who had given security for his appearance, yet neither appeared in person nor was defended by any representative. A special rescript of Antoninus Pius allowed legatees and persons claiming under a trust to be put in possession of a testator's estate if the heir, within six months, did not give proper security. Similarly, by an edict of Hadrian's, amended by Justinian, an heir might be put into possession of the inheritance during the time that his claim was under controversy.

L. 16, D. (xxxvi. 4). L. 3, C. (vi. 33).

Where a person was thus allowed provisional possession, he had the full right and duty to manage the property. Where he was a creditor, he was thereby constituted a mortgagee in possession, and if the debtor fraudulently withdrew himself, he might acquire a right of sale.

(4) REINSTATEMENT (*Restitutio in integrum*).

There was,—as the Roman lawyers themselves well recognized,—no more important department of the Prætor's summary jurisdiction, or rather right, of executive intervention than that by which he was prepared in certain cases to reinstate in his rights and legal position one who, through his own acts or the acts of others, had inadvertently lost them.

The Prætor's Edict defined certain special cases in which he was prepared to accord this relief,—such were youth and inexperience, unavoidable absence from home, or the absence of an antagonist in a law suit, or the fraud or violence of others resulting in the performance, contrary to a true intent, of prejudicial acts. But besides these special cases, there was a general clause in the edict in which the Prætor reserved to himself the right of reinstating on any ground whatever that commended itself to his sense of justice, provided that no law, written or unwritten, forbade it.

The customary period within which application for reinstatement might be made had been the period of the Prætor's office, that is, one year ; but the year was counted from the time of the altered legal position, or, rather, from the moment at which the person who suffered from it first acquired the capacity of bringing forward his application. Constantine altered the period to five years in Rome or four years in Italy ; and Justinian enacted that, in the special cases of an impaired legal position through the inexperience of youth, or through absence, or through the causes enumerated in the comprehensive section of the edict, the application must be made within four years, counting from the time when the person whose rights were impaired was first competent and free to sue for redress. L. 7, C. (ii. 53).

In the case of a loss of rights through fraud, a reinstatement must be applied for in all cases within two years of the commission of the fraudulent offence. L. 8, C. (ii. 21).

In the case of loss of rights through violence, or threat of violence, there was no limit to the time for applying for

reinstatement; but if property wrongfully obtained were not restored within a year from the time of the wrong-doing, and application for reinstatement were made within the same year, fourfold damages could be obtained, all payments made by the applicant being paid back to him.

The reinstatement was effected with the greatest possible efficiency and fulness which the case admitted of, the acquired rights of innocent third persons being respected. All intermediate gains, profits, accessions, fruits, and the like, with the proper interest on capital, had to be made good to the person who would have been entitled to them if the change of legal relationship complained of had not occurred. In calculating these intermediate profits it mattered somewhat whether the person who had already come into possession of them, or might have come into possession of them if he had used due diligence, had been himself acting fraudulently or *bonâ fide*. In the latter case, he was only liable to make good actual receipts, and the person who claimed to be righted was bound to make good all expenses advanced on behalf of the property.

There was one peculiar case in which the Prætor rescinded an act of transfer which did not seem to fall under the general head of fraud. It was where a person alienated property in such a way as to entail on a litigant the consequence of having a more powerful antagonist in the suit or a less favourable tribunal. In this case not only was the act of transfer annulled, but the person who perpetrated it was liable in an action to make good to his adversary the amount of interest that he had in maintaining the state of things as it originally was. This did not prevent a person without fraudulent intention taking steps to pass over his rights of action to another, on the ground of his own ill health or pre-occupations. But even in this case, though the act of transfer would be good, yet the Prætor might see cause to intervene with his interdict, and might oblige the party who wished to rid himself of the suit to employ a representative agent.

There were a few cases in which the Prætor's functions in granting reinstatement, especially on the ground of

non-age, were restricted. Such cases were (1) when a minor on becoming of full age ratified an act previously inaugurated or actually done; (2) in the case of delicts—although even here a magistrate was entitled in exceptional cases to accord a certain measure of relief. According to a law of the Emperors Severus and Antoninus, L. 1, C. (ii. 35). while it was admitted that the weakness of the mind did not excuse moral depravity, yet where a civil injury seemed not to proceed from deliberate intention, there was ground for reinstatement in favour of a minor, and this, too, even where the offence had specially attached to it penal damages; (3) where two minors were concerned, and the position of the one of them who was in possession was upheld, unless at the time of the action he had become the most enriched by what had taken place; (4) where by the special intervention of the emperor, in L. 1, C. (ii. 45). reply to the proper application, a minor was allowed to contract exactly on the same conditions as one of full age. The form of the grant was said to be that of allowing "indulgence or pardon to the fact of being under age,"—*venia ætatis.* Where this grant was made, the minor was still obliged to obtain a special authorization to alienate or hypothecate his immoveable property.

(5) Administrative Functions of a Judicial Kind reserved to the Prætor or his Representative.

The growth of business of a purely administrative kind, which in the course of social and industrial development attached itself to the Prætor's judicial functions, tended to enlarge his personal responsibility at the expense of the judges, whose services were only required in those simple litigious processes involving a few definite issues of law or of fact. The Prætor, indeed, gradually gave way, in the progress of the imperial system of government, to the Prefect of the city of Rome and, subsequently, of Constantinople, and to the subordinate district magistrates of the provinces, appearing under the general title of *rectores provinciæ*, which comprise *consulares*, *correctores*, and

præsides. But the principle of centralizing administrative business of a judicial sort round the person of the magistrate was the same under whatever name the magistrate for the time appeared. And there is no doubt that, anticipating the parallel phenomena of the course of the development of the Court of Chancery in England, the felt difficulty of drawing a line between the administrative and the litigious sides of some of the most important classes of judicial business gave rise to the final absorption of all legal processes into the hands of the magistrate, and to the suppression of the functions of subordinate judges.

It will be well to review a few of the chief cases in which the direct administration in certain judicial and quasi-judicial matters are progressively centred in the Prætor's hands (*Prætoria cognitio*). It will be seen that the obvious grounds for this somewhat anomalous rivalry with the strict principles of the Formulary system were either the fact of some moral considerations, not susceptible of strict legal definition, being at stake; or the fact of a private right being involved inextricably with public rights, or with matters of general political concern; or the existence of a peculiar element of compensation in the rival claims of opposed litigants; or the existence of rights, at present only in an embryonic form, which had only partially passed under the domain of strict law.

To the class of matters especially reserved to the Prætor's sole and undivided adjudication were:—

(*a*) Matters involving claims to trusts under wills (*fideicommissa*). It was the Emperor Claudius who first appointed two special Prætors to deal with this branch of business, though we are told that Titus afterwards withdrew one of them.

L. 2, § 32, D. (1, 2). Ulp. (xxv. 12). Gaius ii. § 278. L. 5, D. (xxv. 3).

(*b*) All pleas, as between parents and children, and patrons and freedmen, relating to alimentary support.

(*c*) All questions of personal relationship between master and slave, or father and children, which, in favour of humanity, conflicted with the principles of the older law, and which were in fact anticipatory of a time when true

legal rights should be recognized as existing in persons in the power of others, and the slave become incontrovertibly a true legal person. A slave had a right to bring his master to justice on an action for suppressing a Will in favour of his own freedom (*actio testamenti suppressi*); and it was by a special rescript of the emperors Marcus and Commodus that the slave was first allowed personally to move in the matter. So special a proceeding was naturally unfitted to become a matter of common litigation.

(*d*) Questions of pure status, whether relating to freedom, citizenship, or family rights, were by a series of enactments reserved for special magisterial investigation. The Prætor recognized this topic of administration in his edict, and while he was ready to accord an ordinary right of action for the assertion of personal claims or rights to property incidentally involved (*de liberali causa*), there is no doubt that, contemporaneously, his own independent right of undivided administration was silently growing.

(*e*) One of the most prominent topics of the Prætor's independent jurisdiction, and the one through which most information is obtained as to its character, methods, and extent, is that relating to guardianship, especially to the removal of guardians who had proved unworthy or unsuitable, the direction of guardians as to the education and place of habitation of their wards, and the alienation of trust estate, and more especially the consideration of claims of exemption from discharging the office of guardian. The proceedings in this last case are given in considerable detail in the Vatican Fragments. Vat. Frag. 155–168.

(*f*) It was seen above, under the head of the Consensual Contracts, which give rise to obligations, that there were certain professional classes of persons who could only claim their fees or honoraria by an extraordinary intervention on the part of the proper magistrate. This class of persons included all public officials, such as judicial assessors, and also all persons who managed the affairs of others as a matter of humanity and charity, or from a sense of their friendlessness and isolation in a strange country (*proxeneta*). D. (l. 14).

The proceedings before the Prætor were naturally of a less formal character than those before the Prætor and judges combined; they are, however, of extreme interest, as they not only historically form, but also distinctly mark, the stepping-stone to the period of what are known as the *extra-ordinariæ cognitiones* under the later emperors, when the Formulary system had become a thing of the past.

The proceedings before the Prætor were ushered in by a written statement addressed to him, of the nature of the complainant's case, and applying for either a specific or some appropriate remedy. This statement (*libelli*) was informally worded, but brief and precise. A specimen of it is contained in the Vatican Fragments. If the complaint was presented in full court, after summons of or notice to both parties (*pro tribunali*), five copies of the statement were to be furnished. If the complaint were addressed to the Prætor when not at a formal session and it took the form rather of an *ex parte* application (*de plano*), four copies only were required.

Vat. Frag. 166.

The first purpose of the complaint was to secure the attendance of the party or parties interested in disputing the claim, or, at the least, to vest them with such a notice of the proceedings as to enable the suit to go on in spite of non-appearance. The Prætor was requested to take steps by what was called an *evocatio*, to secure the necessary attendance of the opposed party or parties. This was achieved by magisterial notices, which took three forms, according as the party summoned lived in the neighbourhood, or lived at a distance, or his whereabouts was not known. If he lived in the neighbourhood, the ordinary magisterial notice (*denunciatio ex auctoritate*) sufficed. If he lived at a distance, an order or warrant (*literæ*) was addressed to the municipal magistrate belonging to the place of his residence, who was required to procure his attendance. In the case of the parties' whereabouts being unknown, a mere public notice (*edictum propositum*) inscribed on the blank notice board of the Prætor sufficed.

Paul. Sen. 5, A. 6, 7.

Vat. Frag. 167.

L. 53, D. (xlii. 1).

The party who had been summoned was liable to be compulsorily made to attend, or to suffer the proceedings to go on in his absence, or to suffer judgment as though by default (*contumacia*), unless excused by ill health, or other valid cause. If he failed to attend after three summonses or, in some cases, after one peremptory summons followed by a public calling of his name three times repeated (*citatio*), he suffered the consequences of absence.

The proceedings went on before the Prætor much in the same way as a formal trial before an ordinary judge. The same sort of evidence was produced in the same way, and the judgment and execution followed exactly the same customary methods, if the affair were of a litigious nature; if it were merely administrative, the Prætor adjusted the matter in his discretion, and afforded the appropriate remedy in accordance with recognized principles. The judgment was read out by the Prætor in the presence of the parties from a written document, and could only be altered or corrected by the magistrate who had prepared it, in trifling particulars, and on the same day.

§ 2.—*Procedure as existing in Justinian's time, or as reorganized by him.*

The growing extensions of the Prætor's independent jurisdiction, and the encroachment of it upon the functions of the ordinary courts, were due not only to the accession of new classes of business, nor only to the greater complication of social relationship. They were among the many signs of the monarchical proclivities of the later republic and the exemption from healthy political suspicion which the executive institutions of Rome more and more enjoyed as the republic became feebler and more corrupt. This is evidenced by the facility with which the earlier emperors stepped into the Prætor's place, and even acquired reputation in the actual and personal administration of justice.

Thus Suetonius, speaking of the Emperor Claudius, says that he exhibited a wonderful versatility (*mira varietas*) in hearing and deciding causes. So the same writer speaks of Nerva as being accustomed, when he heard causes, not to hear each case through to the end but to take in succession the several parts of such different causes as were ready for hearing. So Modestinus speaks of the emperor as authoritatively directing a magistrate to name for a cause a particular judge, in which case he says an appeal lies from the magistrate.

Suet. Claud. 14, 15.

Suet. Nerva, 14.

L. 3, D. (xlix. 3).

This accumulation of judicial business, side by side with the enormous political and military functions which the early emperors assumed, was no doubt among the causes which led to the entire reconstruction of the administrative arrangements of the Empire under Diocletian and Constantine. Other causes—especially the notable extension of the limits and the civilization of the Empire in the south-east of Europe—also contributed to call for a radical readjustment of a machinery which was now worn out, as it was in truth nothing better than a rough adaptation to a wholly new and unprecedented state of things of a political mechanism constructed for Rome, first as a single city, then as the capital of a single country, then as the centre of government of a small number of imperfectly annexed provincial States.

The new organization, which proceeded ceaselessly during the nearly three hundred years intervening between Diocletian and Justinian, marked the causes which had prompted and enforced the sense of its necessity. Centralization, coupled with the relief to the weight at the centre produced by an equable distribution of the pressure of administrative tasks throughout the whole Empire, supplies the key for unlocking the more intricate mysteries of the new organization. In the field of law the progress in these directions is continuous and unmistakable. It will be most conveniently described by treating it successively under the following heads:—

(1) The formal abolition of the Formulary system.

(2) The reconstitution of the system of judicial administration between the time of Diocletian and Justinian inclusive.

(3) The progress of a suit in Justinian's time, including the topics of appeal and execution.

(1) The Formal Abolition of the Formulary System.

It has already been seen that there were a multitude of causes co-operating towards the abolition of the Formulary system before its legislative annihilation. This annihilation was finally effected by two enactments, one of Diocletian A.D. 294, the other of Constantine A.D. 342. The enactment of Diocletian announced it as the emperor's pleasure that the presidential magistrates in the provinces (*præsides*) should hereafter conduct the whole judicial inquiry from first to last in all those cases in which they had previously had the aid of inferior judges; subject, however, to the exception that when much pressed by public business, or by a crowd of judicial suits, they might still relieve themselves by nominating judges, saving, however, those cases in which the Prætor had always had independent jurisdiction (*Prætoriæ cognitiones*). Constantine's enactment is caustic and almost acrid in its vituperatory language. He says, "Let the formulæ at law, which lay a trap for everybody's doings by means of a pettifogging minuteness of attention to words (*aucupatione syllabarum*), be cut away by the roots." Marcus Aurelius had previously abolished the old mode of securing a defendant's presence by exacting the security of *vadimonium*, and had substituted a mere formal notice of action with which the defendant was served (*denunciatio litis*).

This decisive centralization in the direction of despotism, or at the least for the better support of despotic institutions, was facilitated by the reconstruction, for administrative purposes, of the whole imperial Government. The subject-matter of that Government consisted of the metropolitan cities of Rome and Constantinople, the inferior towns with

the districts surrounding them throughout the Empire, and the provinces of the Empire, which, in one sense, were co-extensive with the whole Empire, though, in another sense, they can be opposed to the towns.

The ever-growing ecclesiastical institutions formed a constantly increasing topic of judicial administration, though the implication of the sacred with the secular authorities belongs only to the period of Justinian, and to that of his successors in the East, and of some of his immediate predecessors in the West.

The most notable and permanent change effected by Diocletian was the distribution of the whole Empire into twelve departments or dioceses, comprehended in four provinces. The provinces had each a Prætorian Præfect at its head, and these were severally represented, in the case of dioceses from which the prefect might be supposed to be habitually absent, by vicars (*vicarii*). Constantine so far modified this arrangement as to make the appointment of vicars universal in all the twelve dioceses, so that there might be present in a diocese both the prefect and his vicar at the same time. It was, however, generally expected that the Prætorian Præfect of Italy would be with the emperor in Rome, the Prætorian Præfect of the East with the emperor in Constantinople, and the other two with the armies abroad.

It is not relevant to the present purpose to enumerate the names of the different dioceses, nor to describe the modes in which, under successive emperors, they were distributed among the four provinces. It is, however, worth noticing, that there had grown up, from the times just preceding Constantine, a sort of official nobility, which was the foundation (as has already frequently appeared) of legal exemptions and privileges. The classes of this nobility were determined not only with reference to the actual holding of office, but also to the fact of being in reserve, as it were, and ready for office. The order and names of the classes were signified by the expressions—*illustres, spectabiles, clarissimi, perfectissimi, egregii.*

The prefects and their vicars represented the emperor

for almost all judicial purposes, including that of entertaining final appeals in the several provinces. They not only conducted the ordinary administrative business in supervising the acts and correcting the errors or misconduct of subordinate officials, but they published the enactments of the emperor as well as edicts of their own, in harmony with the general law, and of a similar nature to that of the original Prætor's Edict. The vicars only represented the prefects in their absence, and at other times they were no other than private persons.

(2) THE RECONSTRUCTION OF THE SYSTEM OF JUDICIAL ADMINISTRATION BETWEEN THE TIME OF DIOCLETIAN AND JUSTINIAN INCLUSIVE.

The several classes of judges throughout the Empire may be arranged in order as follows, it being remembered that probably at no one period between the renovation of the government under Diocletian, and the final reforms of Justinian, were all the institutions of which we have an account simultaneously working, and no others. We get glimpses of what existed from such authorities as the codes of Theodosius II., and Justinian, and from such writers as Symmachus and Cassiodorus, dating at some intervals of time from each other. We can only conjecture what belonged to contemporary usage and what was afterwards substituted or supplemented :

(*a*) The four Prætorian Præfects, with their vicars in the twelve dioceses of the Empire, represented the emperor and his court of appeal for almost all causes, that is, for all causes except where persons of the highest rank were concerned, or where it was a matter of appeal from the court of the Præfect itself.

(*b*) The ordinary judges throughout the Empire, in accordance with the new principles of jurisdiction, were at once magistrates and judges. They were comprised under the common name *rectores provinciæ*, and included the different classes of *proconsules*, *consulares*, *correctores*, and *præsides*. The meaning of these names and the cause

of their hierarchical subordination one to the other are found in the particular circumstances in which the different parts of the Empire were organized at the time of their original acquisition. These judges had original jurisdiction, and the requisite executive authority, in all civil matters, in all criminal matters not of general public concern, and in respect of their own officials and municipal authorities.

(*c*) The municipal authorities of towns other than the two great metropolitan cities were either the *duumviri* or local magistrates, chosen on the spot; or the *defensor civitatis*, chosen by the præfect of the diocese in which the town lay, and appointed from among a class of persons other than the local authorities, in order to protect the people against abuses caused by the overweening influence of the richer classes of citizens. The same official might also be appointed by a general vote of all the inhabitants—that is, without the decree of the local senate. The *duumviri* and the *defensor* had jurisdiction in all minor civil causes up to—according to Justinian's latest legislation —300 solidi (little less than £300).

Nov. (xv. 3, 4).

(*a*) The *judices pedanei*—the ordinary judges in the city of Constantinople—were appointed originally by an enactment of the Emperor Zeno's, amended by a Novell of Justinian's. The court consisted of twelve persons, four of them of the highest order of nobility (*illustres*), and apparently engaged in determining the more important matters, and eight selected from the class of professional advocates of the second order of nobility (*spectabiles*), and of whom some at least had previously been judges in the Præfecture of the East. There was an appeal from their court to the emperor immediately—that is, to the emperor's judicial privy council (*consistorium*), or to judges of appeal appointed by the emperors. All matters up to the value of 300 solidi were handled informally, without writing. Thus, this court was co-ordinate with all the other classes of courts in the Empire, with the exception of the emperor's court of appeal.

Nov. (lxxxii. 1).

(*e*) The Præfect of the city at Rome and—after A.D. 350—at Constantinople (up to the time of the appointment

of the last named judges) occupied in fact for these cities the place of the ancient Prætor, and, as such, had both original and appellate jurisdiction, though, of course, without excluding the right of appeal to the emperor.

(*f*) A special court of appeal from the ordinary judges throughout the Empire was instituted by Theodosius II. in order to infuse some steadiness into appellate business and to relieve the emperor's Privy Council and the Prætorian Præfects. This court consisted of two judges only—the Præfect of the East and the Quæstor of the Sacred Palace. These officials were usually on the spot at Constantinople, and represented, for all purposes of appeal except in some very special cases, the emperor himself.

(*g*) The emperor's Privy Council was organized for judicial purposes. The emperor's ears were professedly never closed against hearing of judicial abuses or perplexities in any part of the Empire; and there were many cases in which the dignity of the persons or the extreme difficulty of the causes invited his personal interference, even in spite of the utmost pains to delegate his apppellate functions to others. These matters came before him either in the form of informations (*relationes*, *consultationes*) by public officials, or in the way of prayers and requests of private persons (*supplicationes*, *preces*, *libellus principi datus*).

The court, as organized for the consideration of all these cases, consisted partly of the high officials of the Empire, and partly of persons of high rank, from whom vacancies would be filled up (*vacantes*). The former class (*illustres*) consisted of the four high dignitaries, the *quæstor sacri palatii*, the *magister officiorum*, the *comes sacrarum largitionum*, and the *comes rei privatæ*. There were other officials in greater number of the rank *spectabiles*, and who were styled generally *comites consistoriani*.

It was in this court or council that all the rescripts, edicts, and constitutions proceeding directly from the emperor were prepared and published. It was, of course, attended by a staff of lower officials of the nature of notaries, secretaries, and registrars. There was also a record kept by the proper officials of all pleas, proceedings,

and applications in view of future reference (*scrinium libellorum, epistolarum*). The duties of the subordinate officials were supervised by a special class of officers with a staff of their own (*silentiarii*). The *magister officiorum*, who was a sort of lord chamberlain, had a special jurisdiction over all the officers and servants of the imperial court.

Besides the magistrates and judges of different orders throughout the Empire, there were attached to all the courts, except the lowest courts in the inferior cities, two classes of persons of considerable importance in the general administration of justice. These were (1) the *assessors*, and (2) the *advocates*.

(1) The assessors were attached to all courts of justice except the lowest, but, generally speaking, there was only one to each court. The object of the institution seems to have been twofold—that of providing a sitting magistrate with competent aid in the way of legal erudition, and also that of training young men in the proceedings of courts of justice, and thereby fitting them for the public service. It was usually the practice for an assessor of this sort to attach himself to a particular magistrate for the term of his office, and he received from him suitable remuneration. But the office was a public one, and entitled the holder of it to the general privileges of State officials. Magistrates were, however, specially warned to sign documents for themselves, and not to employ in their stead the signature of the assessor. The proper function of the assessor was that of giving advice, though the magistrate frequently deputed to him special kinds of subordinate business, such as the preparation, or, according to the English expression, the settling, of official documents like edicts, decrees and despatches.

(2) The functions of advocacy had, in Justinian's time, attained considerable development, and the highly organized class of advocates did little more than recall the memory of the patron acting on behalf of his clients in the later days of the republic. There can be no doubt that the

formation of a class of independent advocates, highly trained, having a discipline and rules of etiquette among themselves, and exempted from all other State obligations, must have gone far to correct the despotic tendencies of the imperial legal system. The advocates formed colleges, with corporate rights, in each of the districts or præfectures to which they were attached. Every court of justice had a number of advocates specially assigned to it. For instance, the court of an ordinary district president (*præses provinciæ*) had thirty; the court of the præfect of the city had eighty; that of a Prætorian Præfect had a hundred and fifty. To this number had to be added an indefinite class of supernumeraries, who from time to time, as vacancies occurred, were taken up into the regular body (*statuti*), the sons of advocates having the first chance of this preferment.

The conditions which had to be satisfied by a candidate for the office of advocate were a profession of the Catholic faith, exemption from all the claims of military and the humbler industrial life, the fact of having satisfied all local claims and charges in a municipality if the candidate was a member of a municipal council, and, finally, legal training. For the test of this last condition being fulfilled, the oath of the teacher, and proof of persistence in legal studies for a definite period, were demanded.

The advocates passed through a series of grades of dignity up to the supreme position in this corporation of being *advocatus fisci*, a sort of attorney-general, who received a considerable salary and enjoyed various exemptions, being promoted at last to the dignity of the class of the *clarissimi* or the *spectabiles*. They had a right to claim their fees in a special proceeding at law, and a superior limit to these fees was fixed with reference to the several departments of the process for which an advocate's help might be needed. The latest enactment fixed a hundred *aurei* as the highest fee for the conduct of a whole case.

If a party appeared without an advocate, one was assigned by the magistrate, care being taken that all the legal ability was not accumulated on one side.

Parties continued in Justinian's time to be represented

by a general agent (*cognitor*) or a special agent for the case in hand (*procurator*); and some of the earlier emperors, such as Claudius and Nerva and Hadrian, obtained a deserved reputation for providing official representatives (*Procuratores Cæsaris*), who not only represented the emperor's claims and liabilities for all purposes of litigation, but also seem, like the Quæstors of old, to have intervened judicially to settle claims against the revenue.

But these classes of representative agents must not be confounded with the advocates, properly so called, though it seems that the functions of an advocate were sometimes specially enlarged by the party employing him, so as to include acts of the most responsible kind.

In giving an account of the organization of judicial personages and courts in Justinian's time, it is impossible to omit mention of the functions which the Christian bishops and clergy increasingly exercised from the times of Constantine. There are many signs that the ecclesiastical court (*episcopalis audientia*) of the bishop was popular as a tribunal, partly owing to the growing corruption prevalent in the secular courts, and partly owing to the fees and exactions (*sportulæ*) which repelled the poorer class of litigants. Thus, by a series of enactments reaching from the time of Constantine to those of Justinian, the bishop's court had its jurisdiction,—in secular matters and as between laymen,—partly defined, partly restricted, and partly extended. The tendency to refer all matters to the bishop became at times even an abuse of which the bishops themselves complained. In Justinian's time, the bishop's court was, for all important secular causes, available only as a court of arbitration resorted to by the consent of both parties; but the award of the bishop was carried out as effectually as the award of any regularly constituted arbitration (*compromissum*). Justinian accorded to the regular and secular clergy the right of suing in the bishop's court in all cases not arising out of written documents and capable of being summarily disposed of. In criminal matters of a private sort they could only be sued in their own province before the district

Nov. (lxxix).

governor (*rector*), or before the præfect of the city if they lived in a metropolis.

But the bishops and clergy were furthermore required to co-operate in the administration of justice. They were specially instructed by law to protect the oppressed, to visit the prisons, and to report to the emperor all cases of a denial of justice, if complaint were made by the sufferer to the bishop, and the personal remonstrance of the latter were unsuccessful. Where a party to a suit had reason to suspect the partiality of a provincial or municipal judge, the bishop might be required to act as assessor. Where a private person had a suit with the provincial judge, the case was tried in the bishop's court. L. 22, C. (i. 4).

In some cases, as where a person had a right of civil action against an ecclesiastical official, the bishop's court had to be resorted to first, and the secular court only if one of the parties were dissatisfied. The secular judge might be appealed to within ten days, and he was required in any case to carry either the judgment of the spiritual court or his own into effect. Where the matter was an ordinary civil suit, the spiritual person concerned enjoyed some special privileges, as,—in case the matter came before a secular court,—that of not having to find a surety, or to give security by oath, or to afford other security than that of a general hypothecary charge on his property. If the suit was of a criminal complexion, the spiritual defendant enjoyed no privileges of this sort. It was strictly provided that no purely ecclesiastical question could be mooted before a secular court, though, of course, an appeal could be had to the emperor. Nov. (cxxiii. 21).

There were a variety of other ways in which the growing and ever-extending ecclesiastical organization was turned to account in the general administration of law. It has been seen how, by Justinian's time, the bishops and clergy had drawn within their supervision the regulation of marriages. They were especially required to co-operate with the secular power in putting down gambling. They were the proper guardians of one class of public registers, and were often required by law to witness the entering of

civil documents upon them, or to present the copy of the Gospels for the taking of official oaths.

(3) The Progress of a Suit in Justinian's Time.

The account of the progress of a suit in Justinian's time will be simplified by treating it under the following successive heads :—

(*a*) The institution of the process and mode of securing the appearance of the parties.

(*b*) The conduct of litigation before the production of evidence.

(*c*) Evidence.

(*d*) Judgment.

(*e*) Appeal.

(*f*) Execution.

(*a*) The institution of the process and mode of securing the appearance of the parties.

The process commenced by a written application to the neighbouring tribunal, stating the cause of action, and requesting that the presiding magistrate would take steps to inform the defendant of the plaintiff's claim, and require his appearance, either personally or by a representative. The application was called *libellus conventionis*. It included at once the older summons (*in jus vocatio*), and the older writ, in which the technical grounds of action used to be set out (*actionis editio*). The document was required to contain a statement of the material facts, in the briefest form. It need not conform to any special type, or employ any technical language; it had to be signed by the plaintiff or, if he could not write, by a *tabularius*, or public clerk. At the time of furnishing the *libellus*, the plaintiff was obliged to give security, or an engagement fortified by an oath that he would bring the matter to trial within two months or pay the defendant double the expenses to which he had been put, and further that he would carry the matter on to judgment, and if he lost his cause, make good the costs of the proceedings.

Nov. (cxii. 2).

On receiving this *libellus*, the magistrate made an interlocutory order, in which he either disapproved of the proceedings, as being not founded on a presumable legal claim or on the ground of technical informality, or he served the defendant with a verbal summons to appear. The bearer of this summons (*executor*) was entitled to receive a sort of fee (*sportulæ*), or payment proportioned to the value of the matter in litigation, from the defendant. Twenty days were allowed to enter appearance, and, if bail were not given, or security on oath, the defendant might be forcibly brought and placed in custody, to prevent his evading appearance before the day of trial. The *executor* was responsible for defendant's appearance under a penalty. The defendant, on receiving a copy of the *libellus*, was expected to hand to the *executor* a brief statement of the general nature of his reply or denial (*libellus contradictionis* or *responsionis*). He was also obliged to give security that he would pay any damages that might be awarded against him. Possessors of land and persons of the ranks of *illustres*, and a few other specially privileged classes, were alone allowed to give security by oath.

(*b*) THE FURTHER CONDUCT OF LITIGATION.

The next step in litigation was the argument before the magistrate as to the essential legal grounds of the action, apart from all consideration of the truth of facts.

It may be assumed, then, that, in accordance with the engagements entered into by both the parties, they have duly appeared in the presence of the magistrate at the date assigned, and that the trial, properly so called, is ready to begin.

A word or two must here be inserted as to the place and time of the trial of causes at Justinian's epoch. From the nature of the reformed process of judicature, the ordinary place of trial was the public court in which the magistrate of the district, the præfect of the city, or the Prætorian Præfect, as the case might be, transacted his

ordinary business. A series of enactments, however, harmonizing with the progress of despotism and centralization, had gone far to restrict the publicity of public trials. From the beginning of the fifth century, trials seem to have taken place exclusively in a compartment of the public offices, separated for the purpose (*secretarium secretum*). The public were usually excluded either by screens (*cancelli*) or curtains, which could be removed on occasions: the only persons admitted to the innermost recess were the magistrate and his officers, the parties to the suit, and certain special dignitaries of the empire, or other persons invited for the occasion. No business was transacted on Sundays, or other festivals of the Church. For some time after the reign of Constantine, that is, up to the year 395, the pagan festivals were respected as well. It has been calculated that at least there were about two hundred and forty days in the year on which business could be transacted. Justinian restricted the length of criminal processes to two years, and civil processes to three years; and in the case of inordinate delay of either party, he afforded a special remedy to the other party for the purpose of hastening the proceedings.

L. 13, C. (iii. 1).

The proper occasion for the defendant to put forward all the pleas which, if well founded, would either delay the trial or render it impossible was before the trial had actually commenced. Such were pleas to the jurisdiction (*præscriptio fori, recusatio judicis suspecti*); pleas grounded on the improper joining of parties to the suit, as in the case of a non-qualified agent appearing for his principal, or a person under age not being represented by a guardian; and pleas grounded on the alleged informality of the action, of a kind which could not be set right by amendment.

If these pleas or any of them were supported, the action was at an end. If these were not offered, or were unsupported, the most important stage of the proceedings commenced by first, the two parties, and, afterwards, their

several advocates, making oath that they had a *bonâ fide* cause of action and of defence, that they were not moved by malicious or litigious considerations, and that they would conduct the proceeding to its natural close. Thereupon the plaintiff renewed the statement of his case in a fuller and more exact form than it had in the original *libellus;* and the defendant announced afresh, and with increased particularity, the general grounds of his defence (*narratio proposita et contradictio objecta*). This detailed statement and counter-statement seem, in Justinian's time, to have constituted the *litis contestatio*, and to have marked, as in earlier times, a change of relationship between the parties with respect to the subject-matter of the suit.

It was now the time for the defendant to allege all his pleas, grounded upon objections to the substance of the plaintiff's claim, and for the plaintiff to reply to them. The last part of this stage of the proceedings was one which has had an important influence on modern judicial proceedings,—that of the putting of interrogatories with or without the assistance of the judge by one opponent to the other. The judge alone could restrict these interrogatories, which naturally covered all the matters the knowledge of which was solely in possession of one of the parties. D. (xi. 1).

The matter was now ready for the production of evidence on both sides, and it will be convenient to consider the subject of evidence by itself.

(*c*) EVIDENCE.

The rules of law regulating the production and evaluation of evidence had, in Justinian's time, reached a high degree of elaboration. These rules, in their latest form especially, were largely determined by the fact that one judge or magistrate supervised the whole proceedings, and finally decided on the merits of the case. Thus it was almost impossible to bind him by many arbitrary rules as to the acceptance, rejection, or valuing of evidence, inasmuch as in the very process of de- D. (xxii. 3, 4, 5), C. (iv. 19, 20. Nov. (xc).

termining whether certain evidence proffered did or did not fall within the rule his mind must be, if only unconsciously, influenced by the fact of its existence. Nevertheless, for the regular conduct of judicial proceedings, the information of parties to suits, and, to some extent, the logical instruction of presiding judges, a number of rules were gradually fashioned, which restrained to certain very definite grooves the evidence which was customarily forthcoming in support of the allegations of the litigants in a cause.

As to Burden of Proof.

The rules as to the burden of proof were much the same as now in English law. The burden was said to lie on him who brought forward the substantial affirmative of a proposition and therefore, generally, in the first instance, on the plaintiff; but, of course, the burden would be constantly shifting as the course of the trial, following the affirmations and answers to them contained in the pleadings, proceeded. One who claimed land by a *vindicatio* from an unwarranted occupier, would thus have substantively to prove his title to *dominium;* the occupier would then have the burden removed to his shoulders of establishing his claim to possession, by bringing forward a lease, mortgage, or possessory interdict awarded him for a temporary purpose. The same would take place where the plaintiff's claim rested on an obligation, and it was the case of a personal action. The evidence on both sides would, usually, be taken continuously. The fact of where the burden of proof lay rather affected the mind and conscience of the judge than,—except as to the right to begin,—the order of the proceedings.

Preparation and Sifting of the Evidence.

It was for the judge to decide peremptorily what evidence he would admit in any particular case and what he would disallow. He was, however, bound by a few very general rules and had some broad directions laid down for his guidance. These directions were largely framed on rescripts

of emperors, given in reply to questions of difficulty which presented themselves in the course of the actual administration of justice.

The usual functions of the judge in the treatment of proffered evidence will appear from a summary review of the legal place assigned to the various possible sorts of evidence. It must be premised that some presumptions served in place of evidence on one side or the other, or shifted the burden of proof by establishing, without proof, a state of facts in favour of one of the parties. These presumptions have been classed as—

Presumptio hominis: A hypothetical state of facts conclusively established from the unbroken current of human experience, as apprehended by the judge.

Presumptio juris: Where the law predetermines the probative effect of an actual state of facts; as that actual possession is founded on some right to possess; or that an oath establishes the truth of the fact sworn to; or that a Will, good in form, is good in fact till impeached, it being presumed "*omnia rite esse acta.*"

Presumptio juris et de jure: Where the law makes a presumption of so absolute a character that no evidence is admissible in disproof of it. Such is the presumption, that persons under the age of puberty cannot make a Will or enter into a contract to their disadvantage.

The leading classes of evidence are—

(α) Documents.
(β) Oral Witnesses.

(α) Documents.

Documentary proof was of three kinds, and it was attempted to attach a probative value to each kind in the following descending scale of measurement:—

(i.) Public registers and monuments, including State archives, and such facts, authenticated by the calendar or official or judicial records, as the judges were bound to take notice of without further proof. L. 11, C. (viii. 18).

(ii.) Private documents placed by special enactment in

nearly the same rank of probative force as public registers Such were, in the case of personal actions, documents in the handwriting of the parties. Where the matter was one of a pledge or mortgage, the private document had a preference over a public document, even affirming a later charge, only when it was attested by the handwriting of three witnessses.

(iii.) Private papers, receipts (*ἀπόχα*, *ἀντάποχα*, *cautio*, *syngrapha*), discharges, letters—admitted only if subscribed by three witnesses against a party denying his alleged handwriting.

The comparison of handwriting in order to prove a signature was generally discouraged in Justinian's legislation. It was only allowable where there were three subscribing witnesses to the document, the signature of which was in dispute, and two of the witnesses at least supported its genuineness. But even so, comparison of handwriting was only allowed in the case of public or quasi-public documents, and after oath of the *bona fides* of the litigant seeking to establish the signature.

L. 20, C. (iv. 23).

The plaintiff was required to serve with his *libellus*, at the outset of the action, notice of all the documents, public or private, he would rely on (*editio instrumentorum*). The defendant could not be compelled to produce documents unless he set up a counter-claim by way of defence ; and in a demand for a liquidated sum of money he might call on the plaintiff to produce his books or accounts. Bankers, especially, were required at all times, in whatever capacity they appeared in an action, to produce their books with the dates of the year and day of payments, and receipts regularly marked.

Documentary instruments must be exhibited whole, and when once admitted, no cross-examination was allowed on them. If they were lost, after due precautions were taken against fraud, evidence might be given of their contents ; and copies were admissible where the originals were proved to the judge's satisfaction not to be procurable.

(β) Oral Evidence.

The judge was allowed considerable latitude of discretion as to the admission or rejection of oral evidence. He could exercise his discretion freely without appeal. Before admitting a witness, as well as in estimating the value of his evidence, he was directed to regard the condition of the witness's life in respect of moral character, occupation or profession, social rank, and (after admission of the evidence) the demeanour of the witness in court.

There were some persons whose incompetency as witnesses may be described as being absolute, for the time at least; there were others whose incompetency was only relative, as depending on the particular case.

To the former class of absolutely incompetent witnesses belonged infants and those who had just emerged from infancy (*proximi infantiæ*): this would include all children under about nine or ten years of age; in criminal cases, all persons under twenty years of age; lunatics, slaves (except after torture); persons classed as *infames*, that is following certain discreditable avocations, as that of a gladiator and even a pantomimist.

To the class of relatively incompetent witnesses belonged persons having an interest in the cause: father and son as against each other; persons in the power of one in whose behalf they were summoned; aiders, abettors, accomplices in a wrongful act, persons having deadly enmities (*inimicitiæ capacitates*) with either of the parties.

The judge was generally directed to restrict the number of witnesses, but never to be content with a single witness to a relevant fact (*testis unus testis nullus*). He was generally cautioned to apply all the tests at his disposal, whether based on the personal character, antecedents, number, concurrence of testimony, and bearing at the trial in the aggregate of the witnesses, and not to lean on one criterion of truthfulness to the exclusion of the rest.

L. 1, D. (xxii. 5).

L. 3, D. (xxii. 5).

The judge examined the witnesses himself, and he was told to attend more to who and what they were than to

what they said (*testibus non testimoniis*). The examination was public, that is (in Justinian's time), before the whole court—the parties and the privileged audience (*in secreto*). The witnesses gave their evidence on oath, to which a great importance was attached in all judicial proceedings; the oaths of two witnesses being decisive in cases otherwise doubtful.

The judges were directed not to allow witnesses to be summoned needlessly from a great distance; and, in some cases, it would seem that a judge appointed a local judge (*præses*), a sort of commissioner, to examine a witness and transmit a report of his testimony. Witnesses were awarded their travelling expenses and allowances while waiting for the trial to come on.

(*d*, *e*, *f*) JUDGMENT, APPEAL, AND EXECUTION.

When the evidence had been read in court, or the witnesses orally examined, it remained only for the judge to decide whether the pleas for the defence had or had not been made out; and if they had not been made out, whether the plaintiff had originally a good legal ground of action. In Justinian's time, the judge was allowed to break up his judgment into parts, and to give definite decisions on some points, and to reserve others for future consideration. It had, indeed, long been customary for the judge to reserve special points of difficulty for the emperor's privy council, and the various rescripts, which were the foundation of so much of the law, were obtained in this way. In accordance with the greater complexity of business in the later imperial times, the judge was no longer limited to a simple sentence prescribing the amount of damages, or releasing the defendant from all liability, but he could, and must, afford the fullest relief of all sorts. He was, in fact, an administrator as well as a judge. He directed the transfer or re-transfer of property, the cancelling of documents, and the restitution of civil conditions. The judgment was read out orally from a written document (*periculo*). In

C. (i. 3).

the case of the highest class of judges it might be read by a clerk.

There was generally admitted a right of appeal from all classes of judges, except the lowest (who judged summarily) and the highest (who personated the emperor himself). The appeal had to be, according to the latest legislation, applied for within ten days; in the earlier part of Justinian's reign, two or three days were the limit. Till this time had elapsed, execution was stayed. The judge could not refuse the appeal, nor the party who demanded it withdraw from it. If the judge of first instance was dilatory, he might be compelled to forward the proceedings by an application to the judge of appeal, and if found delinquent, might have to pay a fine to the parties.

The process of forwarding the appeal was for the judge of first instance to direct to the judge of appeal an account of the whole proceedings (*literæ dimissoriæ, apostoli*).

The judge of appeal was bound to proceed in due time, and the parties also were bound to advance matters in such a way that the question was settled within two years at latest. A good deal of detailed legislation prescribed the punctilious precision with which the different steps in the appeal had to be prosecuted.

It is necessary to explain with some precision the chief steps in the development of the system of appeals to the emperor in person between the time of Constantine and of Justinian. The main characteristic of this period was the substitution in certain cases of a sort of private reference by the judge of first instance to the supreme appellate court in the stead of a second formal litigation, conducted by the parties themselves. This reference was called by the several names of *consultatio, relatio, opinio.* It seems to have arisen out of the extreme inconvenience of requiring the parties to an action to travel—it might be from a distant province of the empire—to the seat of the imperial government for the purpose of attending the

prosecution of an appeal. In the earlier form of the new system the judge appealed against himself, prepared a statement of the case for the opinion of the emperor, and, after appending to it the arguments and counter-arguments (*libelli refutatorii*) of both the parties, furnished to him in writing at his request, forwarded it to the proper office (*scrinium epistolarum*), attached to the emperor's court. The parties remained at home in their province, and only in case of a year's delay appeared in person at the court to press for the appeal to be proceeded with or finally dismissed.

Theodosius II. introduced an important change in this procedure by substituting for the emperor's court, in the case of all appeals from judges below the highest class of *illustres*, a special appeal court, composed of the Prætorian Præfect of the East and the Quæstor of the Sacred Palace, sitting as a joint commission representing the emperor. Before this court appeals were to be prosecuted no longer by way of mere private reference (*consultatio*) from the judge of first instance, but in the same way as ordinary appeals, prosecuted by the parties themselves before a competent appeal court, with the customary formalities relative to the communications (*literæ dimissoriæ, apostoli*) proceeding from the judge appealed against, to the statements of the parties, and to the time allowed for completing their cases severally (*dies fatalis*). In the case of appeals to the emperor in person from the judges belonging to the class *illustres*, the method of reference without the further intervention of the parties remained as before. In this last case the hearing of the appeal took place in the *consistorium*, or private council chamber of the emperor, constituted as already described, and the final judgment took the well-known form of an imperial rescript.

Justinian made little change in the system of appeals thus formulated by his predecessor, though, as with almost all other matters, he kept introducing trifling changes up to the close of his reign. The appeals before the court constituted by the Prætorian Præfect of the East and the Quæstor of the Sacred Palace remained as before; though

it would appear that in some points he preserved or reintroduced a memory of the system of appeals before the emperor in person, for which this court was a substitute, by prescribing outward solemnities and formalities which belonged to the imperial court, and had hitherto only been in use when appeals were prosecuted by the method of reference called *consultatio.* Some slight changes were also introduced with respect to the several parts taken by the judge appealed against, and by the parties to the appeal. The parties themselves henceforth furnished all the documents to the court of appeal; the somewhat minute refinements with respect to the time allowed for completing the case on each side (*dies fatalis*) were abolished, and a fixed period of one or two years (varied at different epochs) was definitely assigned for completing the proceedings, without any extension being allowed. No new matter could be introduced on the appeal; and in the case of appeals which came before the emperor's own council chamber, abbreviated statements, or *prêcis* of the arguments on both sides, had to be prepared by the proper officers (*magistri scriniorum*).

L. 30, § 1, C. (vii. 62). Beth. Hole. iii. § 160.

With respect to execution, the universal rule was that while the most effectual remedy was to be accorded, the magistrate was yet to employ civil and not military instruments.

L. 5, D. (xlii. 1).

Execution is indeed the end, as it was historically the beginning of law, and this is nowhere more signally illustrated than in the history of the old legal action of *pignoris capio,* which at first was a mere substitute for legal proceedings, and, a thousand years later, became the culmination of them.

PART III.

THE CIVIL LAW FROM JUSTINIAN TO NAPOLEON I.

CHAPTER I.

THE CIVIL LAW IN THE EAST.

§ 1.—*In the Byzantine Empire.*

THE general fortunes of the civil law in the East, subsequently to the legislation of Justinian, will be most clearly exhibited by distributing the time intervening between his epoch and that of the prevalence of Napoleon's legislation into three periods, the separation of which will be seen to be not entirely arbitrary, but justified, and even suggested, by purely historical considerations. The periods are as follows:—

(1) That between the death of Justinian and the accession of Basilius Macedo (A.D. 565–867).

(2) That between the accession of Basilius Macedo to the capture of Constantinople by the Ottoman Turks (A.D. 867–1453).

(3) That between the capture of Constantinople and the era of the Code Napoléon (A.D. 1453 to (say) 1800).

(1) The Period between the Death of Justinian and the Accession of Basil (A.D. 565–867).

The history of the first three hundred years which followed the legislation of Justinian is determined more by the political vicissitudes of the Byzantine Empire than by what may be called the natural laws of legal growth. Opposed to the due influence of the aggregate body of Justinian's compilations were: (1) The Latin language in which they were written; (2) the diversity of Greek from Latin customs, traditions, and ideas; and (3) the constantly retreating limits of the Empire under Justinian's weak and incompetent successors.

For about forty years after the death of Justinian, that is, up to the accession of Phocas, in A.D. 602, Latin was still the official language of the courts of justice and administration, but the internal disorders, and the invasions of the Empire in the time of Maurice (A.D. 582), and of Phocas, prevented this artificial retention of the linguistic tie to Rome being persisted in.* Indeed, Herennius Modestinus, writing at the beginning of the third century, on the grounds of exemption for guardians and trustees in guardianship, and adopting (earlier, it is said, than any other legal writer) the Greek language, remarked on the difficulty of aptly expressing Roman institutions in a new tongue (*δυσφραστά ἔιναι ἀυτὰ νομιζόμενα πρὸς τὰς τοιαύτας μεταβολάς*) § 1, L. 1, D. (xxvii. 1).

Justinian published most or all of his Novells in Greek, and his successors, Justin, Tiberius, and Maurice, who all published Novells, followed his example. There is a curious passage in Gaius' Institutes in which the transition in legal language from an exclusive use of Latin to the use of Latin or Greek is witnessed before the end of the second century. In the ninety-third section of the third book, it is said that a stipulation containing the terms *spondes, spondeo* can only be in Latin, and does not admit

* See the authorities on this point collected in Duck's "De Usu et Authoritate Juris Civilis," p. 56.

of interpretation, but every other form of stipulation can be in Latin or Greek, whatever the nationality of the contractors, provided they both understand the language employed.

It is well known that in the introductory enactments by which Justinian announced the plan of the Digest (C. *Deo auctore*, § § 12, 13, C. *santa* § 21) he rigidly restricted the right of commenting upon it, and even of annotating it, but allowed translations of words and expressions from Latin and Greek (*κατά πόδα*) and also classified tables of contents (*indices*) and references to parallel passages (*παρατίτλα*) in other parts of the whole legal system.

Thus, in spite of the obstacles which the differences of language opposed to the diffusion and influence of far the largest portion of Justinian's compilations, the way was prepared for maintaining them in use, at any rate for purposes of learned reference and for facilitating the study of them by purely Greek readers. This result was further promoted by the elaborate provision which Justinian made for legal education in the chief towns of the Empire, that is, in Constantinople and Berytus. If he abolished the existing law schools in Athens and Alexandria and elsewhere, it was, according to his own statement (*constitutio omnem rei publicæ*, § 7), because of the undisciplined manner in which the education was conducted. In Constantinople and Berytus the utmost pains were taken to organize the educational system, to provide a high order of superintending professors (*antecessores*), four for each city, and to systematize the study of the whole of the lately published treatises. The result is seen in the number of Greek translations and commentaries, or abstracts of different parts of Justinian's works, which shortly appeared, and which must have had the most important bearing on the continuity of influence exercised in the Greek Empire by those works.

Of these, one of the first and most notable is Theophilus's Greek translation, or rather paraphrase of Justinian's Institutes. The first complete edition in Greek of this treatise was published by Vigilius Zuichemus, professor of

law at Louvain, in 1553, and dedicated to Charles V. The author of the treatise, it is now generally believed, was the same as the professor (*antecessor*) of law at Constantinople, to whom, with other professors, Justinian addressed the celebrated constitution prefixed to the Digest, usually entitled, from its opening words "*Omnem Reipublicæ*," and prescribing the use to which the Institutes and the Digest were to be put in legal education. It is probable enough that Theophilus lectured on the Institutes and, perhaps with the help of his pupils' notes, published a brief summary of the material of his lectures. The work itself, being in Greek, went far to supersede in common use the Institutes themselves, and from its method and plan, which imply a resort to constant practical illustrations, it is the best possible aid to understanding the original work, as well as to comprehending the real working of the law in Justinian's time. There is a French translation of this work, published in 1847 by a competent authority, M. Legat. The chief Latin translation is that of Reitz, who has illustrated the work with all the erudition of which it is susceptible.

Other Greek writers about the same period, that is, during, or shortly after, Justinian's time, translated, commented upon, or republished in the form of compendious abstracts, parts of Justinian's compilations. One of the most complete and systematic of these productions is the commentary on the Digest by Stephen, professor at Constantinople. His work, too, seems to have been a reproduction of lectures, as in one passage we have a reminiscence of the oral lecture ("you will call to mind what I delivered" *), and, otherwise, the professional form appears throughout.

Besides these mere systematic and educational treatises, fragments and recollections have been preserved of various dogmatic treatises on special parts of the law, such as on legacies, on antinomies (περὶ ἐναντιοφανειῶν), on legal aphorisms (κανόνες), on Justinian's Institutes, on penal law, on actions (τὰς ἀγογὰς), on prescriptions (ῥοπὰς). Of course

* See Montreuil's "Histoire du Droit Byzantin," vol. i. p. 135.

it is a matter of much controversy to fix the date or authorship of such treatises as these, of which often only a few passages or pages survive. But the careful researches of such writers as Zacharia and Montreuil attribute them to the latter part of the sixth century, partly on the ground of the use that seems to have been made of them by writers of a little later date, and partly from the internal evidence they bear of being nearly contemporaneous with the latest of the works undoubtedly belonging to Justinian's age.

The greatest difficulty has been experienced in attributing to their proper authors and dates a number of manuals, or fragments of manuals of the civil law, which appeared in the course of the first three centuries following the death of Justinian. It is only, indeed, quite lately * that the authorship, the true character, and the history of the chief of these early manuals, of a purely official kind, have been fixed. This work is called the "Ecloga" (Ἐκλογὴ τῶν νόμων), and was published in A.D. 740, by the order of Leo the Isaurian, and Constantine Copronymus. It purports in its title to be "a compendious abstract of the Institutes, Digest, Code, and Novells of Justinian, with amendments and corrections (ἐπιδιόρθωσις εἰς τό φιλανθρωπότερον). The preface, after dwelling on the obligations which princes owe their subjects to govern with justice, recites that the laws promulgated by previous emperors were scattered throughout many volumes, and their meaning was difficult to be grasped by most of the emperor's subjects, and especially by those living at a distance from the capital; that the emperor had availed himself of the assistance of one high official named Nicetas, another also named Nicetas, and one Marcius, and also of others among the highest officials of the Empire, and had directed them to collect and read through with the utmost attention all the existing law-books, and to digest into one volume, in the most clear and concise manner possible, all the old and the new rules and decisions relating to the civil and the criminal law.

The order of topics followed in the manual corresponds with that of no one of Justinian's treatises, nor is any part

* See Montreuil, vol. i. p. 363, and his references.

of the text of these treatises verbally copied. The subjects of Servitudes and modes of acquiring rights of ownership are omitted altogether, presumably (as M. Montreuil conjectures), because these matters were decided by customary law, and could not usefully be made the material of an universal code. Marriages, wills, guardianship, contracts, and penal regulations are the main topics treated of, and these are just the topics for which definiteness and universality of practice are most indispensable.

The unpopularity of Leo, on the ground of his iconoclastic policy and the insufficiency of the code itself, led to the *Ecloga* being short-lived. It was formally abrogated by Basil, the Macedonian, in the latter part of the ninth century, and fresh resort was had to the compilations of Justinian. Basil, in his own first manual, the *Procheiron*, condemns his predecessor's *Ecloga* in the most emphatic terms. He complains of the composer of the treatise having rather insulted the memory of the pious legislators who preceded him than established his own acquaintance with legal principles. At a still later date Basil says, "I reject and repudiate entirely the trivialities which Leo introduced while engaged in putting himself in opposition to the divine doctrines and in abrogating useful laws." *

(2) THE PERIOD BETWEEN THE ACCESSION OF BASILIUS MACEDO AND THE CAPTURE OF CONSTANTINOPLE BY THE OTTOMAN TURKS (A.D. 867–1453).

The reigns of Basil, the Macedonian, and of his son and successor, Leo the Philosopher, form a memorable epoch in the history of the civil law in the East. The two reigns together gave birth to no less than four celebrated manuals, codes, digests, or compilations of law presumedly based on the treatise of Justinian. They were called severally the *Procheiron*, the *Epanagoge*, the *Anacatharsis*, and the

* Montreuil, vol. i. p. 371. See Zacharia's edition of the *Procheiron* and *Epanagoge*.

Basilica, if indeed the last was anything more than the name given to a new edition of the *Anacatharsis*. Some controversy has arisen as to how far Basil, and how far his son Leo, after his father's death, was concerned in the composition and publication of the greatest and most comprehensive of these treatises, the *Basilica*. The best and latest opinion seems to incline in the direction of affirming that the *Basilica* was completed in the reign of Basil, but that the name was not given to it till a new edition was published by Leo.*

The *Procheiron* (*πρόχειρον νόμον*) of Basil was an official hand-book of the current law, published in A.D. 878, by the Emperor Basil, and his sons, associated with him as *συμβασιλεῖς*, Constantine and Leo. In the preface the royal compilers complain of the incessant increase of the written law and of the innovation springing from imported customary law; and, as a preliminary to a general revision of the laws, they announce their design to issue a manual of law in forty titles, beginning with that of marriage, as affording the bond through which a legitimate birth takes place. The titles were constructed out of the treatises of Justinian, the *Ecloga* of Leo, and the recent legislation of Basil. The versions of Justinian's treatises are mainly those of Greek translators and commentators of the sixth century.

It is from the *Procheiron* that the Greek canonists have drawn their civil law materials, and this manual still figures as one of the recognized sources of the canon law in the Greek Church.

It was seven years after the original publication of the *Procheiron* that Basil published a new edition of it, styled the *Epanagoge*. It contains, like the original book, a preface and forty titles, but the order of the titles is somewhat different, and the distribution of the materials somewhat more logical. The book has not come down entire.

The chief work of Basil's reign was the systematic republication of the whole of the existing law which has

* See, for the whole of this controversy, Montreuil, vol. ii. pp. 46-59.

been named, after its projector, the *Basilica*, or sometimes the *Basilicos* (*νόμος*).

It appears that even before the preparation of the *Procheiron* Basil had set in hand a comprehensive digest of all the laws actually in force, though the work was not completed till after the appearance of the *Procheiron*, which, in that respect, occupied the same place in the legislative system of Basil's reign as the Institutes had occupied in that of Justinian's.

The first form in which the chief work of Basil's and Leo's reign appeared was a publication which contained, in a systematic form of sixty books, all the existing laws, both those which it was designed to repeal, and those which it was designed to keep in force. The object of this was asserted by Basil (in the preface to the *Procheiron*) to be that every one might see the worthlessness of the laws.* It would seem that two separate publications were issued, perhaps contemporaneously, one of which contained the laws to be repealed, and the other the laws to be maintained.

The term "*Ἀνακάθαρσις*," or expurgated edition, seems to have been given to the work containing the laws in force, though some of Basil's expressions in reference to the whole process of legal amendment suggest that the general revision, extending over both publications, was called *ἀνακάθαρσίς*.

There has been much controversy as to the character and order of the great legislative treatises of Basil and Leo, and of the different editions of these treatises.† The balance of authority is in favour of the view that, apart from the *Procheiron* and the *Epanagoge*, Basil published in his reign two comprehensive collections of laws, the first in sixty books and the second in forty books ; and that while the first treatise contained the obsolete or repealed laws as well as those still valid, the second treatise contained only the laws still valid. The difficulty of deciding on the case

* Zacharia's "Historiæ Juris Græco-Romani Delineatio," p. 40.

† See the arguments and authorities on each side, fully stated in Montreuil, vol. ii. pp. 50–57.

comes from the fact that all information about these works comes from allusions to them in the preface to the *Procheiron* and the *Epanagoge*, and from the description of the *Basilica* given in Leo's preface to his edition of it.

Comparing these different notices together, there can be little doubt that Basil actually published what was subsequently called the *Basilica* (*τὰ βασιλικά—βασιλικὸς νόμος*), though Leo published a new edition of it, and in rearranging it recurred to the number of books into which Basil originally cast his first draught.

In the preface to his edition of the *Basilica* Leo says * he has collected together in a summarised form the laws in Justinian's Code, Digest, Institutes, and Novells, and with the aid of Symbatius, the "*πρωτοςπαθαρίος*," and other learned men, he has digested them into sixty books; and under each head placed edicts which belong to it, smoothing the rough and technical legal expressions and distributing the whole into four volumes.

Each of the sixty books of the *Basilica* is subdivided into titles, and each title into numbered chapters (*κεφαλαία*), and the chapters into paragraphs (*θέματα*). The laws of Justinian are reproduced with tolerable exactness, but through the Greek versions, the rules of law from the Institutes, Digest, Code, and Novells severally being cited in order under each topic. The work was, in fact, an authoritative and official rendering, for the first time, of the Latin treatises of Justinian into Greek. The way had already been prepared for this by the numerous private manuals, commentaries, and special treatises which appeared in the age immediately following that of Justinian. The intermediate legislation, with the exception of Basil's *Procheiron*, contributed little.

The legal and literary history of the *Basilica* is sufficient for an independent treatise, and a mere summary of its fortunes, up to the taking of Constantinople, occupies a large portion of the second volume of Montreuil's great work. It is sufficient, in order to track the lines through which the continuity of the civil law was preserved in the east,

* Zacharia's "Delineatio," p. 44.

to notice the chief treatises which traced back to the *Basilica* and became conspicuous land-marks in the later development of the law.

The order and dates, so far as they can be conjectured, of these works, are as follows :—

A.D. 886–916.—*Basilica* and Novells of Leo Sapiens.

A.D. 920.—*Epitome legum*,* proceeding from an unknown author, divided into fifty titles and purporting to be an epitome of the civil and criminal law as gathered from Justinian's treatises and from Basil's *Epanagoge*. The preface, index, and fragments of the whole of this work are preserved.

A.D. 969.—The *Synopsis* (*Major*) *Basilicorum*.† This work was what it purports to be, a brief digest of the sixty books of the *Basilica*. It was divided into twenty-four heads (στοιχεῖα), and the whole into three hundred and forty-eight titles.

The τιπούκειτος ("what? where? is it?"). This was a systematic abridgment and reference book to the *Basilica*, and obtained its name from its purpose, unless its name is really that of its author. One imperfect manuscript of it is still preserved.‡ It is a valuable work as fixing the order of the books of the *Basilica*, and affords a key to the meaning of part of those books which are lost.

The πεῖρα, some time in the middle of the eleventh century. This was a common name given to books of practice. The special treatise here noticed was also called, after the learned authority on whose experience it rests, "The learning of Eustatheus the Roman." The book was divided into seventy-five titles.

About the same period appeared a variety of manuals by private lawyers, generally in amplification of, or commenting upon, the *Procheiron* or the *Epanagoge*.

A curious synopsis of the law, called the "Synopsis of Michaelis Psellus," belongs to this period. It is written in iambic lines, of which there are 1408.

* Zacharia's "Delineatio," p. 62. † Zacharia, p. 64.

‡ See Πολιτική Ρωμαική Νομοθεσία, by Φρεαρίτου, p. 245. Zacharia, p. 40. See also Montreuil III. p. 252.

A.D. 1072.—The legal treatise of Michaelis Attalensis,* which professes, in an iambic dedication, to have been written at the bidding of the Emperor Michaelis Ducas Parapinaceus. There were thirty-seven titles and an appendix, and the headings in the *Basilica* were mainly followed. The appendix contains Novells of Leo and his successors.

A.D. 1072.—At this date appeared an abstract of the first ten books of the *Basilica* by an unknown author. It was divided into ten books, each containing laws from a corresponding book of the *Basilica*, with extracts from the scholiæ appertaining to it and the author's own interpretative comments. Only part of this work has come down. The author often refers to later books of the *Basilica*, and the work seems to have been written at Constantinople.

In the twelfth or thirteenth century appeared another synopsis, usually known as the *Synopsis Minor*, founded on the previous work of Michaelis Attalensis. It was divided into twenty-four heads, the subjects in Michaelis' treatise being rearranged in alphabetical order. The exact date of the work is uncertain, but outside limits can be fixed by internal evidence.

At the beginning of the thirteenth century appeared what is known as the *Procheiron auctum*, a manual by an unknown writer based upon the *Procheiron* of Basil, though containing matter borrowed from most of the leading treatises, including the *Basilica* and its commentaries, which had appeared since the publication of the *Procheiron*. The work consists of forty titles, to which were added thirty-two additional or appended titles (παραρίτλα).

A.D. 1345.—After the *Basilica*, the most important treatise of this whole period was the *Hexabiblus Harmenopuli*. This work was compiled officially by the Nomophylax and judge of Thessalonica, under the special auspices of the Empress Anna and her son, the Emperor John Palœologus. It was based on the leading manuals

* Zacharia, p. 71.

and commentaries already described, and was divided into six books. The work is often known as the *Promptuarium* of Constantine Harmenopulus; and inasmuch as, owing to the Crusaders' occupation of Constantinople, it was in the Morea, in Thessaly, and in the Greek islands, rather than in the Eastern capital, that legal studies were continuously perused, an official treatise by the chief judge at Thessalonica had an importance which was of lasting influence. In the preface Harmenopulus recounts its methods and objects, and says he has travelled over the whole field of past legislation, including imperial novells, provincial edicts, and authoritative manuals. He has selected what was most relevant, and either combined them with the text of the *Procheiron*, or transcribed them separately in their proper place. He had thus extended the forty books of the *Procheiron* to sixty books, while by marks he distinguished the original material of the *Procheiron* from the titles and chapters added by himself. He also mentioned at the head of each chapter the authorities on which he relied. Unfortunately, in most of the surviving manuscripts, these marks and annotations have wholly disappeared.

This work is of the highest interest, as it is through the medium of it more than of any other that Justinian's treatises, the *Basilica*, and all the successive commentaries on the one and the other, were handed down directly to the modern Eastern world. It will be seen shortly that, on the establishment of the new kingdom of Greece under Otho, before new legislation took place, the *Hexabiblus. Harmenopuli* was decreed to be the standing legal text-work

(3) The Period between the Capture of Constantinople by the Ottoman Turks and the Era of the Code Napoléon (say A.D. 1453–1800).

Before the capture of Constantinople by the Ottoman Turks, a series of treatises had appeared in the chief Byzantine towns on the canon law, as received in the Eastern Churches, and on the relations of the canon to the

civil law. These works are frequently important guides to a knowledge of the prevalent civil law, inasmuch as the latter was reputed to be one of the leading sources of the canon law.

A common name for these mixed treatises was *Nomocanon.* Another frequently recurring name was *Syntagma.* In view of their future influence in the Greek world, it is worth noticing a few of the more celebrated of these publications.

John, presbyter, of Antioch, and in A.D. 557 patriarch of Constantinople, published a collection of canons, which became the source of a variety of later works of the same sort. These works usually contain some of the imperial Novells.

In A.D. 883 a collection of canons was published by the patriarch Photius, under the name of *Nomocanon et Syntagma.* This book was largely commented upon and reproduced with modifications and additions. An alphabetical arrangement of "canons and law," under the name of *Syntagma*, was published by Matthœus Blastaris, in A.D. 1335. A translation of this work into the vulgar tongue, or rather a paraphrase, was made by Nicolaus Kounales * in A.D. 1498, and in A.D. 1562, Malaxos, a notary of Nauplia, edited a *Nomocanon*, which has obtained great celebrity.

During the next two centuries several publications of the canons and of portions of works on the civil law, especially of the *Hexabiblus*, were either made or brought to light out of ancient monasteries.

The importance of these works in their bearing on the history of the civil law is great, not only from the continuity of tradition which they impart to Justinian's compilations, which form the basis both of the *Basilica* and of the *Hexabiblus*, but because, when the Byzantine Empire came to an end, it was this class of books which, in the hands of the ecclesiastical and local governors, became almost the sole authority on the law by which the private civil relations of the Greek-speaking people were regulated.

For the most part the Turks did not interfere with

* Zacharia's "Delineatio," p. 88.

the civil law prevalent in Christian countries, especially in the inaccessible parts of Greece proper, in the Greek islands, and in Servia, Moldavia, and Wallachia. In some of the Greek territories, as, for instance, in Cyprus, there were preserved, in the local customs and dominant laws, relics of the Western occupation in the times of the Crusades, as, for instance, feudal usages based on the Assizes of Jerusalem.* Up to the present century the people of Moldavia and Wallachia have, in common with the Greeks and Greek-speaking populations, been governed by the works above described of Blastaris, Harmenopulus, and Malaxos. The Moldavian law was first codified in 1816, and it was not till 1865 that it had a code following the type of the Code Napoléon.†

In Greece proper the *Promptuarium* of Harmenopulus had legal force given to it, in anticipation of further legislation, by a law of the 23rd of February, 1835. It had already been recognized since 1828, in substitution for the *Basilica*, which had been enforced soon after the outbreak of the revolution in 1821. Various codes have, since 1835, been published of different branches of the law.

In Servia, in Montenegro, as well as in Russia, there are formed, for the use of the Greek-speaking part of the population, various combinations of the canon law and the old civil law. The history of the civil law in Greek-speaking countries is thus one of unbroken continuity.

It now remains to be seen how far the system of law established by Mohammed and his followers in other parts of their dominions was a new system, or was in fact only, like the *Basilica*, a re-publication of Justinian's system in an Arab dress.

* See Gibbon ch. lviii., *sub. fin.*, and Zacharia's "Delineatio," p. 137.

† Rivier's "Introduction Historique au Droit Romain," p. 451.

§ 3.—*The Civil Law in the Arab dominions generally.*

The sudden appearance of what purports to be an entirely new, original, and independent system of law in the East, professedly based on the Koran and the learned commentaries upon it, is so unique a phenomenon that the question instantly suggests itself, What is the historical foundation for the claim to originality of the so-called Mohammedan law? There is, antecedently to considerations of evidence, the strongest historical presumption against the validity of this claim.

It has been so much the custom to connect a prevalent system of law with the name of either a real or a mythical lawgiver that it need occasion no surprise to find that the complicated legal system prevalent in Mohammedan countries is connected with the name of Mohammed, just as other equally celebrated systems have been associated with the names of Moses, Lycurgus, Draco, Solon, and even Numa Pompilius. It is now understood that a legal system which is actually in use, and really represents the sentiments and habits of a people, has never been the product of a single mind or even of a single age. A Justinian, a Basil, or a Napoleon may digest, codify, or amend existing laws, but he can go only a very little way towards creating an original system of laws. If ever there was a country in which definite and uniform laws are urgently needed it is the territory included in the British dominions in India. Yet, with the unhampered power and full disposition to legislate systematically for this territory, the British Government are compelled to leave the bulk of family law, a vast portion of the land laws and village customs, the whole of the religious laws, no small part of the local governmental laws, and even some of the criminal laws, wholly untouched. It is only in the procedure of the central courts, in the law relative to the more modern contracts, and in the general body of the criminal law, that the notable legislative efforts of the last half century in India have been felt.

Thus there is a strong presumption to start with that

the systematic and compact system of law which the Mohammedan conquerors generally introduced into their conquered countries was a mere transformation of some highly perfected system of law already existing.

Now it happens that the rise of Mohammedanism and the first outburst of the Mohammedan successes in Arabia, Syria, Persia, and Egypt, belongs to the century which intervened between the completion of Justinian's legislation in A.D. 565 and the publication of the *Ecloga* by Leo the Isaurian (and Iconoclast), in A.D. 740.

During all this time, in spite of the reverses which, in military matters, the Byzantine Empire had experienced, there is every reason to believe that the elaborate organization and method of legal education prescribed by Justinian in the chief towns of the Empire were uninterruptedly maintained. Berytus, indeed, which was a chief centre of the faith from the time of its conquest by the Mohammedans, had exclusive privileges bestowed upon it as a law school (Const. *omnem reipub.* §§ 8, 9, 10). Owing to an earthquake and fire which destroyed the city, the school was temporarily removed to Sidon before Justinian's death. A school of law had existed here from the time of Alexander Severus.

We know of a body of advocates at Cæsarea from passages such as that in the Institutes which recounts how, on Tribonian's suggestion, an important law, defining the responsibilities of guardians in respect of giving receipts to their ward's debtors, was first promulgated in the presence of advocates from Cæsarea ("*Cæsarienses advocatos*," § 2 Inst. (ii. 8)).

Even after the law teaching had been suppressed by Justinian at Alexandria (which itself is a testimony to its prevalence), Agathias, in his life of Justin (Justinian's successor), recounts his own legal studies in that city, which, about the same time, suffered heavily, like Berytus, from the shock of an earthquake.*

The fact of this organization of legal studies in the

* See Montreuil's "Histoire du Droit Byzantine," vol. i. p. 110.

chief towns, coupled with proofs of the assiduous attention bestowed on Justinian's compilations,—supplied by the Greek dress in which compendiums of them appeared from time to time,—sufficiently establish the conclusion that, at the time of the Mohammedan conquests, the civil law in a Greek garb was not only practically in force throughout the dominions of the Greek Empire,—especially in the towns of Asia Minor, in Syria, in Egypt, and in the Greek islands,—but that it was a subject of earnest and unremitting professional study.

So much for a presumption in favour of the influence of the civil law exercised over the Mohammedan legislation, and against the notion that this legislation could have sprung up of itself and have instantaneously superseded the ubiquitous and deeply rooted system which preceded it.

The general character of the Mohammedan conquests and settlement in the conquered countries tends to convert a presumption into a conviction.

What the Mohammedan conquerors insisted upon in all cases was either tribute or conversion, and both the one and the other meant plenary and ostentatious submission. But it meant no more. There were no attempts to organize and administer the conquered countries like those of the Romans and English in respect of their successively annexed dominions. It will shortly be seen that the Koran only professed to legislate broadly on a few characteristic practices and institutions interesting to the natives of Arabia. There was neither in the Koran nor elsewhere during the first few caliphates any attempt to interfere with the complex details of civil life in the richly civilized communities brought under Arab sway. There were neither the leisure for this, nor the requisite intellectual capacity, nor the sort of men needed for the task.

It was only when in Bagdad, in the cities of Spain, and in Cairo, there was repose and opportunity for study and reflection, that medicine, mathematics, logic, and the fine arts, were studied and made to flit with a meteoric radiance

across the midnight of Western thought. If Aristotle supplied the Arabians with their logic, it was Basil, Leo, and their Greek commentators who supplied them with their law. The question only was how to weave these Greek and Roman ideas, which were at the root of the national habits, were the basis of a long established system of academic learning, and were expressed in treatises of the highest and widest celebrity, into the language of the Koran, and to amalgamate the institutions familiar to the Greek world with those which had become characteristic of the Mohammedan rule.

This task has been achieved not without success, and the result is a system which, if not quite homogeneous, is yet practically uniform for all Mohammedan populations in the world.

It remains to illustrate this reasoning by stating clearly what is the amount of true law applicable to the purposes of civil life in the Koran, and what are the chief points of analogy or identity to be found in the current systems of Mohammedan law and the civil law of Justinian.

The chapters of the Koran (Sale's edition) in order, not including every scattered rule of law throughout that very disjointed treatise, contain the following legal rules and principles which, in an occasionally expanded form, exhaust all that the authors of the Koran have to say about strict law as distinguished from ethics and religion.

Chapter II. Oaths, Divorce, Usury, Written Contracts, Witnesses.

"Make not God the object" (that is, says Sale, as a bull to shoot at with arrows) "of your oaths . . . . God will not punish you for an inconsiderate word in your oaths; but he will punish you for that which your hearts have assented unto: God is merciful and gracious."

"Ye may divorce your wives twice, and then either retain them with humanity, or dismiss them with kindness. . . . But if the husband divorce her a third time, she shall

not be lawful for him again, until she marry another husband. But if he also divorce her, it shall be no crime in them if they return to each other."

"They who devour usury shall not arise from the dead, but as he ariseth whom Satan hath infected by a touch; this shall happen to them because they say, Truly selling is but as usury: and yet God hath permitted selling and forbidden usury."

"O true believers, when ye bind yourselves one to another in a debt for a certain time, write it down. . . . But if he who oweth the debt be foolish, or weak, or be not able to dictate himself, let his agent [or manager, Sale] dictate according to equity; and call to witness two witnesses of your neighbouring men; but if there be not two men, let there be a man and two women. . . . But if it be a present bargain which ye transact between yourselves, it shall be no crime in you if ye write it not down. And take witnesses when ye sell one to another, and let no harm be done to the writers nor to the witness. . . . And if ye be on a journey and find no writer, let pledges be taken; but if one of you trust the other, let him who is trusted return what he is trusted with and fear God his Lord."

Chapter IV. Orphans, Marriage, Intestate Succession.

"If ye fear that ye shall not act with equity towards orphans of the female sex, take in marriage of such other women as please you, two or three or four, and not more. . . . And when ye deliver their substances unto them, call witnesses thereof in their presence: God taketh sufficient account of your actions. God hath thus commanded you concerning your children. A male shall have as much as the share of two females: but if they be females only and above two in number, they shall have two-third parts of

what the deceased shall leave; and if there be but one, she shall have the half. And the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child and his parents be his heirs, then his mother shall have the third part. And if he have brethren, his mother shall have a sixth part after the legacies which he shall bequeath and his debts be paid.

"Moreover, ye may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave. . . . They also shall have the fourth part of what ye shall leave, in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave. And if a man's or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate; but if there be more than this number, they shall be equal sharers in a third part."

Chapter V. Wills.

"O true believers, let witnesses be taken between you when death approaches any of you, at the time of making the testament; let there be two witnesses, just men, from among you; or two others of a different tribe or faith from yourselves, if ye be journeying in the earth, and the accident of death befall you."

Chapter IX. Division of the Year.

"Moreover, the complete number of months with God is twelve months which were ordained in the Book of God."

Chapter XXIV. Criminal Law, Slaves.

[Punishments for adultery and calumnious imputations.]

"Unto such of your slaves as desire a written instrument allowing them to redeem themselves on paying a certain sum write one, if ye know good in them."

These are all the elements of a strictly legal sort, on which has been erected the enormous structure of Mohammedan law, which is at this day the dominant code for millions of people throughout the Ottoman dominions, in India, and in many parts of Africa not subject to Ottoman sway.

In the sparse rules which have been quoted it is difficult to trace a Roman origin, and their source must probably be searched for in Arabian customs, or possibly the Jewish law. All the more remarkable is it that the edifice of law built by the Mohammedan jurists on these primitive materials recalls the common principles, and often the specific rules, of Roman law at almost every juncture. There are just sufficient variations to indicate some originality of treatment, though the type followed is unmistakeable throughout.

The following tabulated arrangement of principles which appear in the most characteristic systems of Mohammedan law,—slight variations as to time and numbers being admitted for the several "rites" or customary forms in which the law has been cast,—will show the close parallelism between Mohammedan and the latest Roman ideas and practice.

1. General principles applicable to the functions of guardians, natural or testamentary, for minors below the age of sixteen.
2. Institutes of:—
   - Usufruct.
   - *Wackf* (*res universitatis vel collegii, emphyteusis, superficies*).
   - Servitudes. Rights of water: *ne prospectui officiatur;* rights protected by Interdicts: *de damno infecto, de arboribus cœdendis.*
   - Distinction between movable and immovable property.
3. Order of intestate succession:—
   1. Descendants *ad infinitum.*
   2. Ascendants.
   3. Collaterals, whether whole or half-blood, and their children and grandchildren.

4. Husband or wife.
5. Patron (of liberated slave).
6. Ascendant, descendant, or collaterals through adoption.
7. The public treasury.

The inheritance was divided into legal portions in the way the Roman inheritance was treated as a divisible *As.* These parts were—

A. Half.
B. The fourth.
C. The eighth.
D. The two-thirds.
E. The third.
F. The sixth.

4. Wills. Verbal or written with two witnesses.
   The testator cannot dispose of more than a third of his patrimony without the consent of the legitimate heirs. [*Portio legitima. Inofficiosum testamentum.*]
5. Contracts.
   General disabilities or grounds of mental incapacity, prodigality, bankruptcy, legal or moral obstacles.
   Conditions of a valid sale. [*Redhibitio, pre-emptio.*]
   Cession of debts. (*Nominis venditio.*)
   Classes of contracts.
      Letting.
      Partnership.
      Loan.
      Deposit.
      Mandate or Agency.
      Pledge and mortgage. (Hypotheca cannot be sold without express contract.)
      Security and bail. [*Fidejussio*].
      Settlement of doubtful claims. [*Transactio.*]
      Sport and gaming, so far only as calculated to foster agility and strength in men and animals. [*Contractus aleatorii*, L. 2, § 1, D. (xi. 5). *Senatus consultum vetuit in pecuniam ludere: præterquam si quis certet hastâ . . . quod virtutis causâ fiat.*]
   Proceedings on insolvency. Resort to, first, money,

then to movables, and last to immovables. Relief to poor debtor. [*Venditio bonorum. Beneficium competentiæ.*]

Prescription of ten or fifteen years, according to different rites.

General principles as to absence, uninterrupted possession, minority and insanity.

Term of prescription in case of *Wackf* (quasi-religious endowments) thirty-six years. [Nov. 131, c. 6, 10, 20, 30 *et* 40 *annorum præscriptio pro sacrosanctis ecclesiis et aliis venerabilibus locis.*]

No prescription in case of public or government property.

Prescription of twenty or thirty years for a debt established by express documents.

of two years for a beast of burden or domestic slave.

of three years for animals that cannot be ridden (as buffaloes).

[C. Jus. (vii. 31). *Si quis alienam rem mobilem seu se moventem in quacunque terra sive in Italicâ sive in provinciali bonâ fide per continuum triennium detinuerit is firmo jure eam possideat quasi per usucapionem eam acquisitam.*]

The probability, or rather the necessity, of the central principles and common rules of Mohammedan law being nothing else than the Roman law of the later Eastern Empire in an Arab dress, is confirmed by noticing the recognized and authoritative sources from which the law prevalent among Mohammedan populations is presumed by its own professors to take its rise, and to which any controverted question is habitually referred as a final criterion.

These sources are :—

I. Ordinances of successive supreme religious chiefs *e.g.* the Ottoman Sultans (*quanoun*).

II. Rules and maxims of canonical Mussulman law, based on (*el-Seerie*)—

1. The Koran and its more authoritative commentaries.
2. Traditions (*sunna*) of words, acts, and silence of the prophet, preserved by his companions and their contemporaries, and by the first four caliphs.
3. Authoritative treatises on the Koran.
4. Special treatises on the Law of Succession.
5. The opinions of the mufti or more renowned jurists (*fetwa*).

Out of these sources of Mohammedan law it has been seen how much and how little the Koran contributes expressly. It has also been seen (excluding from consideration the direct pontifical legislation of the Ottoman Sultans) how complex and exact a structure of law has been erected on the original foundations, and yet that tradition and learned treatises or opinions have been the only recognized instrument of legal reform. When it is found, then, that it was in countries in which schools of Roman law, text-books of Roman law, Roman law courts, and magistrates and officials imbued with Roman law from their early college days existed, that all this elaborate system of rules and ideas grew up,—reproducing, with a curious mixture of sameness and variation, the essential principles of the latest phase of Roman law,—the conclusion is irresistible that the system is nothing else than Roman law itself very slightly transformed. Indeed, if, as Emanuel Deutsch said and seemed to establish, the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions.

In this way the history of Roman law in the East is brought up to modern times through two distinct channels, that of the relics of the Greek Empire, surviving in modern Greece and in the Sclave provinces of Eastern Europe, and that of Mohammedan law wherever it prevails.

CHAPTER II.

THE CIVIL LAW IN THE WEST.

§ 1.—*General Representation of the Progress of Roman Law from the Era of the Barbarian Codes to the Period of the Middle-Age Universities.*

THE history of Roman law has been traced through the Theodosian Code up to the embodiments of parts of that code and other earlier treatises in the remarkable systems of law published by such conquerors as Alaric and Theodoric for the use of their Roman subjects, and often known as the laws and codes of the barbarians. The Breviary of Alaric probably both survived the conquest of the Visigoths by the Franks in A.D. 507 and also took the place of the Roman code published by the Burgundians when, in A.D. 534, the Franks took their place. The edict of Theodoric succumbed, at the fall of the Ostrogoths in Italy, to the publication of Justinian's laws in Italy, in A.D. 554.

It thus appears that in the middle of the sixth century two distinct streams of Roman law were simultaneously carrying its influence forward into the coming centuries. One of these streams proceeded from the Theodosian Code and such parts of the elementary treatises of Gaius, Ulpian, and Paulus, as had been incorporated in the "Breviary," the "Roman law" of the Burgundians, and the Edict of Theodoric. The other stream proceeded from the legislation of Justinian, including his Institutes, Digest, Code, and Novells. Besides these two ascertainable and emphatic

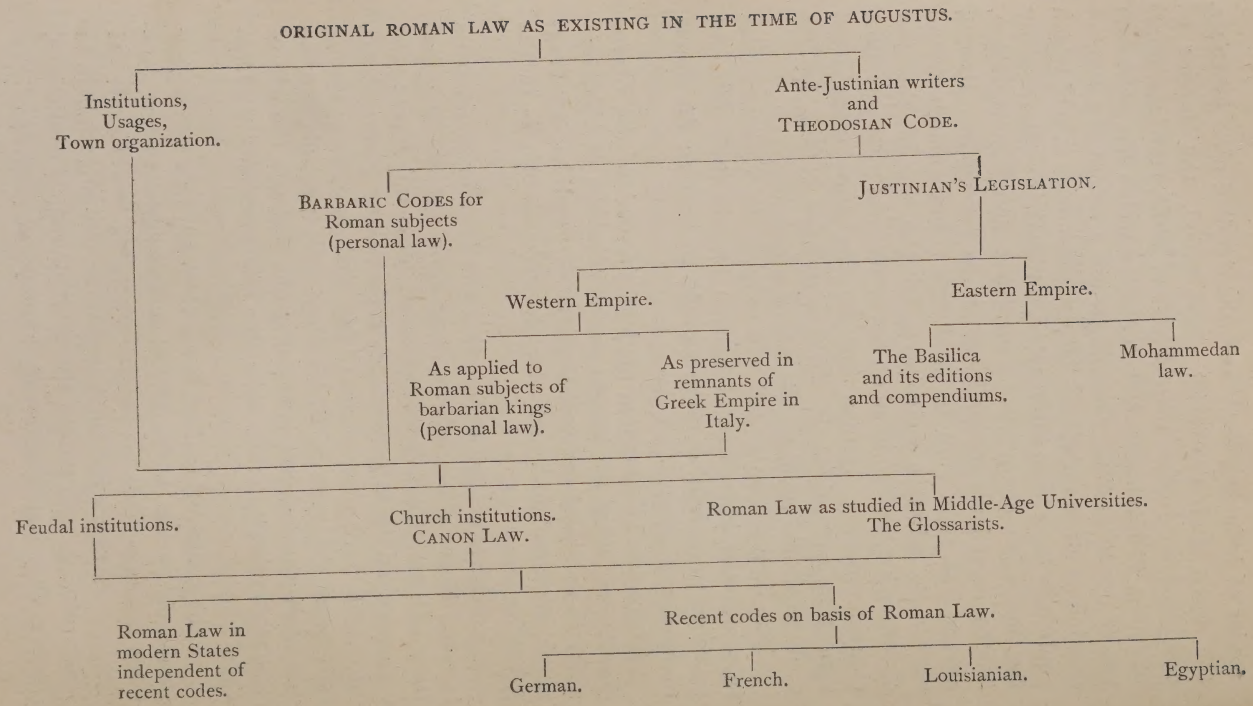
modes of influence, there were the detailed civic practices, the town and provincial organization, the modes of administering justice, the old laws of Wills, marriage, guardianship, conveyances, and contracts, which the unbroken use of centuries must, throughout not a few of the Roman dominions, have translated into popular usages, and which could only have been interrupted, rather than obliterated, by the barbarian conquests. Corruption and disintegration, indeed, must have gradually set in as the central Roman energy was proved to be paralyzed; but enough would remain to afford a machinery for the use of the new governments, and to hand on the memory of what was most characteristic in Roman law to the time when legal education, as revived in the Universities of the twelfth century, should build up the edifice afresh.

The diagram on p. 418 will exhibit the various modes in which the influences of Roman law, in their different relations to each other, were brought to bear on the States of modern Europe.

There will be found printed at the end of the *Corpus Juris*, after what are known as the "Novells of Tiberius," among some scattered constitutions of Justinian, a "Pragmatic sanction," of which the eleventh chapter is in the following terms:—

"Furthermore, we decree that the laws or enactments inserted in our codes, which, some time ago, we sent into Italy and published by edict, shall have full force: and we command by a general edict that those constitutions, too, which were promulgated later shall have force also in Italy from the time at which they were promulgated, so that, since the republic is become one through the will of God, the authority of our laws also may be extended everywhere."

In the constitution (L. 2, § 24, C. (i. 17)) *De vetere jure enucleando*, by which the Digest was enacted as law, Justinian commands all his judges, according to their several jurisdictions, to use the Institutes, Code, and Digest, both in Constantinople and within the limit of their jurisdictions, wherever they were (*easdem leges suscipiant, proponant*).


ORIGINAL ROMAN LAW AS EXISTING IN THE TIME OF AUGUSTUS.
Institutions, Usages, Town organization.
Ante-Justinian writers and THEODOSIAN CODE.
BARBARIC CODES for Roman subjects (personal law).
JUSTINIAN'S LEGISLATION.
Western Empire.
Eastern Empire.
As applied to Roman subjects of barbarian kings (personal law).
As preserved in remnants of Greek Empire in Italy.
The Basilica and its editions and compendiums.
Mohammedan law.
Feudal institutions.
Church institutions. CANON LAW.
Roman Law as studied in Middle-Age Universities. The Glossarists.
Roman Law in modern States independent of recent codes.
Recent codes on basis of Roman Law.
German.
French.
Louisianian.
Egyptian.

It may thus be assumed that at the close of Justinian's reign the Institutes, Digest, Code, and Novells, of Justinian were circulated throughout Italy; and—the law contained in them harmonizing as it did with the laws already in use—it may be supposed that it needed scarcely more than a single generation of judges and administrators to make them thoroughly familiar to the people, and especially to the professional lawyers in the courts.

The limits of Justinian's Empire in Italy were, within a very few years, cut short by the Lombards. Without following the political events of the two or three centuries which succeeded the death of Justinian, it is sufficient, for the present purpose, to notice that, counting from the submission of the whole of Italy to Justinian, in A.D. 554, the dominion of the Eastern Empire in Rome continued for 172 years, when it was brought to an end by the successful insurrection against Leo the Iconoclast, in A.D. 726. The Empire continued in what was known as the Exarchate of Ravenna (which, it is important to notice, included the seat of the future University of Bologna) for 198 years, that is, till the conquests of the Lombards, in A.D. 752. Finally the Eastern Empire still held a place in Naples and in the Greek towns of Southern Italy well into the ninth century, when these towns gradually enfranchised themselves, the Eastern dominion in Italy, with all the legal and judicial influence which that dominion implied, being thus brought down to a period some 300 years beyond the death of Justinian. In the meantime, the compilations of Justinian, especially in their Greek forms, had undergone no integral change in the centre of the Eastern Empire, the *Basilica* not being published till the opening of the tenth century.

There were many circumstances which tended to prolong the existence and memory of the old Roman law, even in the part of Italy and the Western Empire which had been fully reduced under the power of the barbarians. It was inevitable, for instance, that Roman law should continue to preside over all transactions which took place in towns. The separate and independent organization of towns had always

been a distinctive feature of Roman rule. The political character and relationship of the several towns had always varied much, but there was always a certain amount of self-government present which would tend to keep alive, and to guard against foreign influences, the local laws. These laws, of course, largely related to contracts, sales, marriages, guardianship, Wills, and succession; and it is just this part of the Roman law which reappeared in the least mutilated form at the foundation of such of the modern States of Europe as did not entirely succumb to feudalism and its institutions. It is, indeed, more extraordinary how little reference, even of an unconscious kind, there is to Roman law in the capitularies of Charlemagne, in the Salic law, and in the Anglo-Saxon laws, than that in the towns of Southern France and Northern Italy the memory of Roman ideas and institutions should have been preserved by an unbroken tradition.

Another important mode in which the memory of Roman law was protected and handed down to a later age by the Barbarian sovereigns themselves was the institution of "personal law." Savigny, in his "History of Roman Laws in the Middle Ages," has cleared up the real nature of this institution, which had been misapprehended by most other writers, from Montesquieu to Hallam. At the period of the barbarian conquests, especially during the fifth, sixth, and seventh centuries, the law applicable even to the conquerors themselves was personal rather than territorial. The Lombard, the Goth, the Frank, the Burgundian, the Saxon, and the Roman, if casually residing in the same district, all enjoyed their separate laws. "It constantly happens," says Archbishop Agobard* in a letter to Louis le Debonnaire, "that of five persons, who are walking or sitting together, not one is subject to the same law as another." It was somewhat the same as at Alexandria at this day,

* Agobardi Epistolæ ap. Bonquet, "Recueil des Historiens," tom. vi. p. 356, Ed. Paris, 1749. "Nam plerumque contigit ut simul eant aut sedeant quinque homines, et nullus eorum communem legem cum altero habeat exteriùs in rebus transitoriis, cùm interiùs in rebus perennibus una Christi lege teneantur."

where, for many purposes, English, French, Italians, Germans, Austrians, Greeks, and Egyptians are severally subject to their own laws, which, however, are, in this case, administered in separate consular tribunals.

The personal law of each was determined by certain fixed rules. Generally speaking, a man inherited the law of the nation from which he was descended on his father's side; but there were exceptions. The Roman law was the law of the Church and of all ecclesiastics; but if a person who had children entered the service of the Church, the alteration of his law did not affect his descendants. Even in the case of ecclesiastics, however, the change of law was not imperative. It was only illegitimate children who could choose their own law. A married woman could, if she liked, assume the law of her husband; if she became a widow, she returned to the law of her father. A freedman, among the Burgundians, enjoyed his paternal law; among the Lombards, he was subject to the law of his patron. The Ripuarians recognized two forms of manumission, a Ripuarian and a Roman, each of which conferred upon the freedman the corresponding law; and it rested with the master to determine which of these forms should be used. For the purpose of administering the various systems of law, it seems that assessors of different nationalities were employed. An instance occurs in the account which has been handed down of an imperial decision given in a court sitting at Ravenna in A.D. 967, which was composed of Romans, Franks, Lombards, Saxons, and others.* In applying the different laws, the composition for crimes was determined by the law of the aggrieved party. In civil matters, the law of the defendant regulated the decision. In later times, the judgment appears to have been pronounced upon a comparison of the respective laws of the parties.† The validity of all judicial acts and of

* Fantuzzi. "Monumenti Ravennati de' Secoli di Mezzo." Venice, 1802, vol. ii. p. 28.

† "Collatis Justinianiæ et Langobardorum Capitulis legis—dederunt sententiam." Mabillon. Annales ordinis St. Benedicti, Paris, 1707. Appendix to vol. iv. No. 32.

oaths, bonds, and wills was determined by the law of the person performing the act. The Burgundians, however, had the option of employing either the Roman or the Burgundian form in the execution of wills and grants. In a law of the Lombard King Luitprand,* notaries are strictly enjoined to frame all documents either according to the Lombard or the Roman law.

These notices of the actual administration of Roman law under barbarian rulers, the full import of which was first brought to light by Savigny, are indeed extremely minute, and impress the common-place imagination far less vividly than the notion of a sudden re-discovery of Roman law through the finding of a copy of the Digest at Amalphi, when the city was taken by the Pisans, in 1135. But the facts above adverted to, which are worked out at length by Savigny, sufficiently show that such a discovery, even if historical, was wholly superfluous for the purpose of the diffusion and knowledge of Roman law. In town life, in the transactions of commerce and trade everywhere, and in every court of justice in which any one of Roman parentage could be a suitor, Roman law was ceaselessly obeyed and practised. In the meantime, the Barbarian Codes and the compilations of Justinian, which were in actual force in parts of Italy up to the ninth century, and had been extensively circulated in the sixth and seventh, must have kept the authoritative text of the imperial law in its best and latest forms contantly before the eyes of those concerned to know and study it.

§ 2.—*The Middle-Age Universities and the Glossarists.*

The next distinct stage in the history of the civil law in Europe is marked by the practice of the public teaching of law in some of the cities of North Italy, especially Ravenna, Pavia, and Bologna. Peter Damianus, bishop of Ostia, born at Ravenna in 988, has left behind him a treatise, *De parentelæ gradibus*, in which he cites five passages of

* Leges Longobard. i. 29, 2.

the Institutes of Justinian, and refers his opponents to the codes—*ad vestros codices, ad Instituta vestra recurrite.* He also says that when he came to Ravenna he found much discussion going on on the degrees of consanguinity. There are also scattered notices in early records of Archbishop Lanfranc, and of Bishop Pepo of Bologna, of the teaching of law in Pavia and in Bologna in the course of the eleventh century.

It is Irnerius who is usually reputed to have been the founder of the great law school of Bologna, at the beginning of the twelfth century.

Irnerius is known as the first of the "Glossators," a school of critical commentators on the manuscripts of Justinian's compilations, whose works had a considerable influence on the mode in which the law was studied in Europe for some centuries afterwards, so much so that it came to be held that an unglossed passage had no validity. The process of "glossing" included readjustment of the text, and interlined or marginal notes, first short, and afterwards long, for the purpose of explaining difficulties and reconciling contradictions. The first phase of the school of glossators lasted during the whole of the twelfth century. It continued during part of the thirteenth, and closed with Accursius, who died about 1260. It was from Bologna that, in 1144, Vacarius, one of the chief glossators, was brought to Oxford by Archbishop Theobald, for the purpose of founding a law school there. When there he published—so far as the notion of publication is applicable to those times—his book of briefly annotated extracts from Justinian's works, so as to spare students the expense of rare manuscripts. His work was called "Liber ex universo enucleato jure exceptus et pauperibus præsertim destinatus." It is said that from this book the name of *Pauperists* was given to the Oxford students.

The University of Bologua presents a brilliant spectacle at this time. Whatever "darkness" there was in these Middle Ages came from the obscurity and limitation of the subjects of study, and not from the want of illumination in the students and their teachers. It is said that at one

time there were as many as ten thousand students gathered at Bologna from different countries, of all ages and of all professions, clerical as well as lay.

Besides reconstructing the text and adding marginal explanations, the glossators commented in four other distinct ways, that is to say, by what were called *apparatus, summæ, casus,* and *brocarda. Apparatus* were continuous and connected comments of an expository and paraphrastical kind. *Summæ* were brief and summary accounts of the text to be given afterwards, like the heading in italics prefixed to an English law report. *Casus* were illustrative varieties of circumstances for the purpose of showing the purport and detailed application of a law. *Brocarda* were general rules of law drawn from comparison and reconciliation of texts.

In the middle of the twelfth century that curious rivalry sprang up between the Roman civil law and the laws of the Church which gave rise to the creation of a separate code of Canon law for the government of the Church and its members, which, as will shortly be seen, became itself an important instrument in the preservation of the form and some of the notions of the old Roman law.

It was Bernard, the accuser of Abelard, who made an outcry against the devotion shown by ecclesiastics to the study of the secular law. Addressing himself to Pope Eugenius III. (between 1145 and 1153) he says, "Quando oramus? Quando docemus populos? Quando ædificamus ecclesiam? Quando meditamus in lege? Et quidem perstrepunt in palatio leges, *sed Justiniani non Domini.*" *

Successive Councils held in France forbade ecclesiastics to study secular law. Thus the Council at Tours in 1162, presided over by Pope Alexander III., prohibited any one who had vowed a religious profession from studying physics or secular law (*leges mundanæ*). At the beginning of the next century, in 1220, Honorius III. republished this decree, and forbade the teaching of Roman law in Paris

* "De Consideratione," ad Eng. iii., lib. 1, ed. 4, ton 2. p. 410 of the edition of 1690.

and the neighbouring towns under pain of excommunication. This decree has been incorporated in the body of the canon law. The reason given in the decree is that in France, that is, in the isle of France, and in many of the provinces, the laity do not use the laws of the Roman emperors. The real object is said to have been the reservation to the University of Paris of its predominance in theology.

The consequence of this prohibition was the creation of the School of Law at Orleans, in 1236, and the fuller development of schools in the South—such as those of Montpellier, the first French school of law founded in 1180 by the great glossator Placentinus, and of Tours.

M. Ortolan,* in the interesting survey which he gives of the fortunes of the civil law in early France, as above described, notices the curious ulterior history of this prohibitory decree of 1220. More than three centuries afterwards (in 1576) a decree of the Parliament of Paris accords exceptionally and "*sans tirer à conséquence*" to Cujas and the professors of Canon law at Paris the privilege of lecturing and taking degrees in the civil law by reason of the state of the times (*de la qualité du temps*), that is, on account of the religious troubles which interrupted the teaching of law at Bourges. The prohibition was renewed by an edict of 1579, and only removed finally by an edict of Louis XIV., in 1679, more than four centuries and a half after it was first issued.

The history of the glossators and of the strictly University teaching of the civil law in the Middle Ages closes with the two names of Accursius, who died about 1260, and Bartolus, who died in 1357, that is, about a hundred years later, long before which last date the useful work of the glossators was nearly over, and was being transformed into a trifling and worthless playing at criticism, not to say an idolatrous veneration for authoritative names. But, in spite of the railleries of Rabelais, these remarks do not apply to such real luminaries as Accursius (professor of

* "Histoire du Droit Romain en Occident. Institutes de Just." vol. i., § 616.

law at Bologna for forty years) and Bartolus (professor at Pisa and at Perugia) themselves.

For about a century and a half after the death of Bartolus a new school of commentators and jurists had arisen in France and Italy, of which the leading names are Budé, the secretary of Louis XII. and Frances I., Alciato, professor of law at Avignon and commentator on three books of the code of Justinian, and Cujas, who received, in 1576, as has been already stated, an exceptional permission from the Parliament of Paris to lecture on the civil law. This school has sometimes been called that of the "Humanists," in consequence of the growing tendency they manifested to study the sources of the law in a literary and historical spirit. From the time of Cujas his notes and commentaries have continued to be of a value which will, probably, never be out of date.

§ 3.—*Canon Law.*

It is impossible to follow the fortunes of the civil law in Middle Europe without pausing to recall the competition which, from the twelfth century onward, took place between that law and the rival system known as the "Canon law." This competition not only resulted in imparting fresh stimulus to the study of the civil law in the Universities which were open to it, from the alliance which was henceforth proclaimed between the civil law and the secular power, represented by the Empire as against the Church, but tended to encourage legal studies generally, while preserving in the new ecclesiastical *Corpus Juris* much of the language, the form, and the conceptions of the civil *Corpus Juris* on which they are unavoidably based. The true nature and place of the Canon law can only be understood by reverting to the general history of internal Church legislation and of the efforts which had been made from time to time to republish and codify the laws of the Church.

It is necessary to notice that the following exact meanings are given by the best authorities to the terms

canon, decree, and *decretal epistle.* A *canon* is an ordinance made and ordained in a general council or provincial synod of the Church. A *decree* is an ordinance made by the Pope, by and with the advice of the cardinals assembled, but not in response to a question or consultation. A *decretal epistle* is what is decreed by the Pope, either acting alone or by the advice of cardinals, and in response to a question or consultation.*

It was in the earlier Christian centuries, and before the assumptions of the Roman Bishop had acquired preponderance, that the Church as a whole, and that each local division of it, was governed by acts of councils and synods, that is, by canons in the above sense. It was thus of importance to have all these canons collected and verified. The earliest known systematic editor of such a collection is Dionysius Exiguus, a Scythian monk, who took up his residence at Rome towards the end of the fifth century. Another distinguished collector of canons was Isidore, a Spanish monk of the sixth century.

The importance, political and religious, of these collections was obviously so great—especially in an age without printing or critical habits—that it can scarcely be wondered at that imposture was attempted, and with great success. It was in the ninth century that there was ushered into the world a collection of Church documents, purporting to be legally binding, and bearing, in the most distinct and detailed way, on the points at issue between the Pope and his clergy, and also between the Pope and the secular powers. Dr. Milman (*History of Latin Christianity,* Bk. v. ch. iv.) has dwelt upon the strong temptations that existed in the circumstances of the Church for a fraud, now generally admitted to be such. The lower clergy were groaning under heavy oppression; the conflicts between the Popes and their Italian enemies were subordinating the Christian society to the Empire and the world. The property of the Church was insecure. Violence and anarchy prevailed everywhere.

* Mr. Benjamin Shaw's art. on Canon Law in "Dict. of Christian Antiquities," vol. i.

The new code added to previous collections, which it incorporated, fifty-nine letters and decrees of the twenty earliest popes, from Clement to Melchiades, A.D. 311, and the fabulous donation of Constantine. Besides these there were included decrees of popes and acts of councils (many of them unauthentic), from the time of Sylvester, A.D. 314, to that of Gregory II., A.D. 715, of which thirty-nine decrees are proved to be spurious.

The general effect of the new decrees was to assert the supremacy of the Pope, the exclusive dignity and privileges of the see of Rome, and the right of appeal to Rome.

The exact date and authorship of the fraud is not known. It is said by Fleury that the compilation crept to light near the close of the eighth century. On the other hand, it was not published till the time of the Pope Nicholas (who died in 867), of whom Milman says that "in one year he is apparently ignorant of their existence, in the next he speaks of them with feeble knowledge." They seem to have first emerged from the city of Mentz, and the imputed author is "Isidorus *Mercator*" (probably copied for *Peccator*). They are usually known in history as the "False Decretals" of Isidore. The existence and character of this forgery throws so instructive a light on the part which Church laws played just before the time at which the true Canon law began to be codified that it has been necessary to give a somewhat full account of it.

One result of their publication was to occasion a considerable amount of controversy between the supporters of the genuine and of the false legislation. Another consequence was to give a fresh impetus to the study of Church law and to its codification. Collections of ecclesiastical laws were published in the tenth century by Regino, the bishop of Prüm, and by Burkhard, Bishop of Worms, and in the eleventh century by Yves, Bishop of Chartres.

It was the revival of the study of Roman law in the University of Bologna in the twelfth century, as already described, which gave the next marked impetus to the study and development of the Canon law; and this

impetus was much accelerated by the use which it was found could be made of the old Roman law and of the Canon law respectively to support the rival pretensions of the Emperor and the Pope. Thus Neander, in his Church History, notices that, "Irnerius stood forth as an ally of the imperial power in the contest with the Papacy; and it was, in fact, the famous teachers of law at that University who were employed by the Emperor Frederick to investigate and defend his right at the diet of Roncala." The more eager, therefore, would be the hierarchical party to oppose that hostile tendency by setting up another system in defence of their own interests and principles through the study of ecclesiastical law from an opposite point of view.

It was to serve these ends of the Church that, in the very heart and home of the civil law at Bologna, between A.D. 1130 and A.D. 1150, Gratian, a Benedictine monk residing at Bologna, in the monastery of St. Felix and Nabor, prepared a new and comprehensive code of the Canon law. The immediate purpose of the treatise was the instruction of the young by means of an epitome of the writings of ancient doctors, the epistles of pontiffs, and the decrees of councils fitted for academical use. The work went beyond the previous compilations, inasmuch as it digested, rearranged, and summarized the whole existing material, only in certain cases—as in the case of the pretended decree of Constantine (*Distinc.* xcvi. cc. 13, 14)—purporting to cite the original law, decree, or canon in its primitive form.

Commenting on this part of Gratian's *Decretum*, Professor Bryce says ("Holy Roman Empire," ch. viii.):—"The edict proceeds to grant to the Roman pontiff and his clergy a series of dignities and privileges, all of them enjoyed by the emperor and the senate, all of them showing the same desire to make the pontifical a copy of the imperial office. The Pope is to inhabit the Lateran Palace, to wear the diadem, the collar, the purple cloak, to carry the sceptre, and to be attended by a body of chamberlains. *Et sicut imperialis militia ornatur ita et*

clerum Sanctæ Romanæ Ecclesiæ ornari decernimus. . . . The notion which prevails throughout, that the chief of the religious society must be in every point conformed to his prototype, the chief of the civil, is the key to all the thoughts and acts of the Roman clergy; not less plainly seen in the details of the papal ceremonial than it is in the gigantic scheme of papal legislation. The Canon law was intended by its authority to reproduce and rival the imperial jurisprudence. A correspondence was traced between its divisions and those of the *Corpus Juris Civilis;* and Gregory IX., who was the first to consolidate it into a code, sought the fame and received the title of the Justinian of it." It was, however, Gratian who, nearly a century before Gregory IX., wrote the Institutes of the Canon law.

The *Decretum* of Gratian is divided into three parts. The first part is divided into 101 *distinctiones.* The first twenty of these *distinctiones* are concerned with law in general and Canon law in particular. Afterwards the different orders of the clergy, their qualifications, ordinations, duties, and powers are treated of. The second part is distributed into thirty-six canons, each embracing several questions which are treated of in one or more questions. This part deals with the rules and principles of proceedings in ecclesiastical courts. The third part is much shorter than either of the preceding. It is divided into five *distinctiones*, and treats of the consecration of churches, public worship, the sacraments, fasts, festivals, and images.

In estimating the influence exercised by this treatise on the perpetuation of the civil law, it is important to notice such passages as those in the first *distinctio*, which explain what is meant by *jus naturale, jus gentium*, and *jus civile*. *Jus Quiritium* is said to be "proprium Romanorum, quod nulli tenent nisi Quirites, id est Romani. In quo agitur de legitimis hæreditatibus, vel curationibus, vel de contractibus, de tutelis, de usucapionibus, quæ apud nullum alium populum referuntur sed propria sunt Romanorum et in eos solos constituta."

In the second distinction it is said that "Jus Quiritium constat ex legibus et plebiscitis et senatus consultis et constitutionibus principum sive responsis prudentum."

These several sources of the *Jus Quiritium* are then defined in the language of the classical writers on Roman law, and examples of laws called after their authors are taken from the *Leges Corneliæ* and *Leges Juliæ*. Thus it is obvious that the republication of the canon law could not but operate as a fresh recognition of the lasting validity, within its own limits, of the Roman civil law, while the language and forms of the new Canon law codes tended to reproduce and preserve the ancient legal phraseology and logical forms of thought.

The pontifical patronage, soon extended to this process of codification, secured its influence. Heineccius (*Hist. Juris Germ.*, lib. ii. cap. iii.) recounts that, in A.D. 1151, after completing his work, Gratian begged the Archdeacon of Bologna to send it to the Pope to be confirmed by his authority and to be commended as an authoritative academical text-book. The Pope acceded to the request; and in the following year (A.D. 1152) Gratian, who previously seems to have publicly taught philosophy and other subjects of general knowlege, was constituted by the Pope professor of the Canon law. In fact, two public expounders of the law were nominated by the Pope, of whom Gratian was one.

Afterwards, by a further decree in 1153, Eugenius III. established academical degrees in the Canon law of the same sort as those hitherto appropriated to the civil law and to arts. The study of the *Decretum* was also portioned out by the Pope among the five years of study in the same way in which Justinian had distributed the study of his compilations. Thus, it was to take three years to study the first third of the *Decretum* and to qualify for the bachelor's degree; one year more to study the second part, and to qualify for the licentiate; and another year to study the third part of the *Decretum*, and to qualify for the doctor's degree.

Other compilations followed that of Gratian, and in the

reign of Innocent III. (A.D. 1198), as many as five are said to have been constructed.

It was less than a hundred years after this solemn papal authorization of Gratian's treatise and institution of the Canon law as a subject of academic study, that Pope Gregory IX., by the help of Raymondus de Penna-forti, his chaplain, published a new digest of the Canon law, comprising an abbreviated summary of the *whole* law and the decretals of Gregory IX. One reason of this fresh publication is said to have been the constant recourse which was still had to Justinian's works in order to explain and supplement Gratian's *Decretum*. This new treatise was specially commanded by the Pope to be exclusively used in judicial proceedings and in education. Gregory writes "*Ut hac tantum compilatione universi utantur in judiciis et in scholis.*" Not, however, that the authority of the *Decretum* was impugned, and, indeed, it continued to be used and cited by the popes themselves. (See for instances Heinecc., *Hist. Juris Germ.*, lib. ii. cap. iii. § 69, note 8.)

There was one special advantage in these authoritative publications of the decretals and in the public teaching of the Canon law in the universities; it was the check given to the circulation of false decretals and bulls. In the absence of printing the prevalent ignorance, coupled with the growing importance attached to papal utterances, made the temptations to forgery enormous; and we hear of papal bulls, such as the one of Innocent III., specially directed against falsifiers of papal documents.

The complete *Corpus Juris Canonici* comprises some decretals of Gregory IX.'s successors up to the end of the fifteenth century, and thus includes the ecclesiastical legislation of more than two centuries and a half, and a summary of the legislation during earlier centuries. The usual editions contain the following collections :—

A.D. 1234. Five books of the decretals of Grègory IX. and summary of other decretals and canons.

A.D. 1298. Sixth book, containing decretals of Boniface VIII. [This was not received in France because of differences between the Pope and Philip the Fair.]

A.D. 1313. Constitutions of Clement V.

A.D. 1340. *Extravagantes* of John XXII.

A.D. 1483. *Extravagantes Communes*, consisting of decrees of popes from Urban VI. to Sixtus IV.

Thus, as Arthur Duck says (*De Auth. Juris. Civ.*, lib. i. cap. 7, § 8), "The Roman pontiffs effected that in the Church which Justinian effected in the Roman Empire. They caused Gratian's decree to be compiled in imitation of the pandects; the decretals in imitation of the code; the sixth book, the Clementine constitutions, and the 'Extravagantes,' after the fashion of Justinian's Novells; and, that nothing should be wanting, Paul IV. (A.D. 1555), ordered John Paul Launcelott, in 1580, to prepare Institutes of the Canon law, which were added to the *Corpus Juris* in the time of Gregory XIII."

It is important to notice the respective provinces and mutual relations of the canon law and the civil law in countries in which they were both recognized.

It was admitted that if, on a matter of mere interpretation, either system expressed itself ambiguously or uncertainly, it was allowable to have recourse to the other, whatever the court or the case in hand. The same rule prevailed if either system was entirely silent on a question in dispute. Where there was a conflict, the canon law rule prevailed in Church courts and in the dominions of the Church, while the civil law rule prevailed in secular courts and in the dominions of secular sovereigns.

In any case that presented itself, whatever the court, the civil law gave way to the canon law whenever the matter in hand seemed to touch the safety of souls or the commission of sin. Thus, in prescriptions, while the civil law allowed a term of lengthened prescription to give a title even to a *malâ fide* possessor, the canon law did not, and this latter rule prevailed. So in usury cases, the canon law rules were followed. In marriage questions, the canon law prevailed, the consequence being that a marriage might be held good even in the absence of the requisite consent of parents; and a wife who had survived her husband might

marry again within the year, the canon law removing the penalties imposed by the civil law. So also in matters of moral justice, if the canon law was more favourable to a benign and equitable view of the situation than the civil law, the canon law principle prevailed. The influence of this maxim in the establishment of the equitable jurisdiction of the English Court of Chancery is well known.

§ 4.—*The Civil Law in Modern States before the French Revolution.*

(1) THE CIVIL LAW IN FRANCE.

The remarkable place which France has occupied in the preservation and revival of Roman law through the construction of the Code Napoléon, renders it of some importance to trace the steps by which the copious Roman law elements in that code were handed down on the French soil from the days of the Roman dominion in Gaul. It is true that much of the wording and arrangement of the code is copied almost *verbatim* from the commentaries of Pothier or the works of Justinian. But it was the opposition of the two systems of law which prevailed severally in the Roman-law provinces (*pays de droit écrit*) and in the customary provinces (*pays de droit coutumier*) which mainly enforce the necessity of having such a code, while the rules and interpretations of the Roman law, as announced in the writings of Pothier and transferred to the code, may be said to have been of indigenous growth.

The first problem to be solved in tracing the history of Roman law in France as a native growth coeval with the monarchy, and independently of university teaching and foreign influences, relates to the nature, history, and extent of the opposition between the law of the Roman-law provinces and that of the customary provinces. The problem has given rise to much controversy in France, as might be expected from the dark period of history to which its earlier phases have reference. The result of this

controversy, however, has been to throw a clear light on much of the path, and to reduce the questions which are still unsettled to a few of slight importance.

The provinces which from time immemorial were said to be governed by Roman law and which were called *pays de droit écrit* were either those bordering on Italy or those first conquered by the Romans and last conquered by the Franks. To this number belonged Guienne, Provence, Dauphiny, and Aquitaine. They were said to include all those districts which depended on the Parliaments of Toulouse, Bordeaux, Grenoble, Aix, Pau; and some which depended on the Parliament of Paris, such as le Lyonnois, le Forêt, le Beaujolais, and a great part of Auvergne.

As to the history of this distribution of provinces, it was customary at one time to attribute its origin to nothing more noticeable than the imperfect conquests made by the Franks in some parts of the country in which the Roman law, during an occupation of five hundred years, had taken a deep root, and the feebler hold which Roman law had as against feudal institutions in the countries farthest removed from the Italian border. Heineccius, however,* has ably criticized this theory, and pointed out that,—considering that Roman law was the only legal system which for hundreds of years together was habitually administered throughout the whole of Gaul, while the competing customs were different for different provinces, and at the same time uncertain and only to be ascertained by positive evidence, —the sharp distinction between the Roman-law provinces and the customary provinces must have been due to some positive historical events which occurred long after the Roman dominion had passed away. This period he fixes at the end of the ninth century, when the centralization introduced by the Carlovingian dynasty was relaxed, and the feudal lords kept up a constant and successful resistance to the claims of the Crown. In the troubles of the times might, rather than right, law, or justice, held sway. The administration of law was loose and irregular. Customary usages easily held their own when asserted on behalf of the

* "Historiæ Juris Gallicani Epitome," § vii.

strong and the rich. It became, indeed, the interest of the feudal potentates to encourage differences of practice and usage in order to prevent combination among vassals.

This account, though it does not explain the lines of separation between the two classes of provinces, yet discovers the existence of causes capable of enabling local usages to compete, under favourable circumstances, with the ancient and familiar principles of Roman law. The account seems all the more plausible when it is considered how Roman law has always played a part, even in the customary provinces, in all cases in which no appropriate custom could be cited.

That the distinction between the customary and the Roman-law provinces was well marked in the thirteenth century appears from casual allusions in State documents, as when Honorius III., writing in 1220 (Heineccius, *loco cit.*, § 7), says, "*Quia tamen in Francia*" (that is, in the isle of France) "*et non nullis provinciis laici Romanorum imperatorum legibus non utuntur;*" and again, when Philip the Fair, in an *ordonnance* of 1312, relating to the study of the civil and canon law at Orleans, says, "*Regnum nostrum consuetudine moribusque præcipue non jure scripto regitur licet in partibus ipsius Regni quibusdam subjecti, ex permissione nostrorum progenitorum et nostrâ juribus scriptis utantur in pluribus.*"

It remains to be seen in what sense Roman law actually prevailed before and after the thirteenth century in the provinces to which it was held especially to belong, and how far it has held a place even in the legal system of the customary provinces.

Dr. Arthur Duck,—whose treatise, *De usu et authoritate Juris Civilis Romanorum per dominia Principum Christianorum*, printed in London in 1689, has, perhaps, more repute than any other treatise on this class of subjects by an Englishman, excepting, perhaps, Selden's *Fleta*,—has attempted (lib. ii. cap. v.) to mark the limits within which Roman law has, in historical times, really been applied in the "countries of written law." In those provinces he points out, and establishes by proofs, that a reference to

royal ordinances was only admissible in a judicial argument so far as those ordinances supplemented and facilitated the application of the Roman law, and did not purport to override it. According to the language of French lawyers royal ordinances were to be observed in *Præparatoriis Judiciorum*, but Roman law obtained in *Decisoriis*. In other words, the surrounding procedure might be varied by positive legislation from time to time, but the substantial issue was to be referred always to principles of Roman law. When an appeal took place from a Roman-law province to the supreme Parliament of Paris, which place was subject to customary law, the decision on appeal was, by a special enactment of Philip the Fair, to be in accordance with Roman law. On the occasion of provinces being detached from the Parliament of Bordeaux, which presided over Roman-law provinces, and annexed to a Parliament such as that of Paris, usually cognizant of customary law only, the Roman law was to be applied in all matters affecting that province. Thus, in these provinces, even after the annexation, Wills were to be made, contracts made and executed, and justice administered acording to Roman-law rules.

Up to the time of Francis I. the Latin language was still in use for law proceedings in the provinces.

The practical consequences of the prevalence of Roman law in a province were of an important and sometimes beneficial kind. Thus it was that, in the case of high treason, a criminal's property was confiscated to the State. The father's power extended for some purposes of property over a daughter, even after marriage. Contracts were allowable, feudal usages were received in evidence, and appeals were conducted on principles at once more liberal and more systematic than in the customary provinces. A significant distinction was that in a Roman-law province foreigners—including, of course, Burgundians and Flemings, who were close neighbours, and constantly passing to and fro—could make Wills, or could have their property pass in case of intestacy to their natural heirs, which was not possible in a customary province.

Nevertheless it was, of course, quite possible that in a Roman-law province special customs and local or personal rights of a special sort, and guaranteed by special enactments (*statuta*), might exist; and, furthermore, learned commentaries on the Roman law might have, and had, great weight. But these all had to be specially alleged and proved. The common law was Roman, and alone needed no proof.

It is to be remarked that, in spite of the deep foundation which Roman law had in the provinces subject to it, it was originally rather a concession to the conquered than an original and indigenous right. It was, in fact, regarded throughout as an inalienable constitutional privilege. Somewhat in the way in which Scotch law for Scotland is regarded in the English constitution and recognized in the House of Lords, sitting at Westminster as a Court of Appeal, so the Roman law was recognized in the Parliament of Paris.

A question of greater difficulty has been raised as to the place which Roman law held in customary provinces. It is generally admitted that for all those departments of law on which the customary laws are silent, the *lacunæ* are to be filled in from Roman law. But it is a much controverted point whether this supplementary law came in by its own inherent force, as a sort of common law, only displaced by the customs so far as they went, or operated merely by way of direction to the judge and as the best-organized expression of legal reasoning.

It has, no doubt, been always laid down that where, in deciding a case, the customs in a customary province are insufficient as a clue to the solution, it is the duty of the judge to refer to Roman law. One reason alleged for this was that, on any theory of the origin of these customs, there was a prominent Roman-law element in them, side by side, it might be, with Gaulish, Burgundian, Gothic, and Frank usages or legislation. For this reason Roman law was held to supply the most likely index to the meaning of a doubtful or imperfectly defined custom. Thus, in a case where, according to the custom of Brittany, the age for making a will was not assigned, the Roman age of fourteen years was

judicially imputed. It was said that Roman law was used when rendered applicable by the peculiar nature of the subject-matter, just as the Roman lawyers resorted to the Rhodian laws in maritime cases, because of the deficiencies of their own authorities. It was said, too, that in the customary provinces the Roman law might obtain by usage and regal allowance. Thus, a custom grew up of a special regal license, through the chancery, being required for certain Roman-law remedies, such as the *restitutio in integrum*, rescission of contracts, or those founded on the *Senatus consultum Velleianum* (restricting the capacity of women in the matter of giving security). In cases, however, where these or the like Roman-law remedies rested directly on custom, no special licence was needed.

The history of French law between the time of the complete separation of the Roman-law provinces from the customary provinces and the epoch of the French Revolution is concerned with the progressive codification of the customs for the customary provinces, with the study of Roman law and its interpretation as conducted in the law schools and in the Universities, and with the development of the legal system of the country generally by the ordinances of the kings and with the co-operation of the Parliaments.

The codification of the customs was both partial, or local, and general. One of the earliest local codes was that contained in the charter of the Commune of Beauvais, granted by Louis the Young in 1144, relating among other things to trial by peers. In 1173, Henry I., King of England, granted a charter to the inhabitants of Bordeaux, which allowed them to choose a mayor. The charter of Rouen, granted by Philip Augustus in 1207, confirmed the ancient rights and privileges of the town in all that respected communal self-government and trade.

There were also early collections of customs of whole provinces, such as those of Champagne, Burgundy, Normandy, Anjou, and Amiens. The most considerable collection of this sort was that of St. Louis, made in 1270, and

usually known as his *Établissements*, comprising the customs of Paris, Orleans, and Anjou. The word *établissement* means "an edict, or decree," and it is by this word that Pierre de Fontaines, a contemporary writer, translated the term "Prætor's Edict," calling it *ban et établissement.* The preface to this collection announces that it was made to confirm good usages and old customs, as amended by laws and canons.

Besides these charters and official collections of customs, private authors of the thirteenth and fourteenth centuries published collections, more or less systematic, made by themselves. Such were the "Customs of Beauvoisis," compiled by Philippe de Beaumanoir in 1285; the *Somme Rurale* of Bouteilles; the "Grand Coutumier," composed in the reign of Charles VI., and the "*Décisions*" of Jean des Mares.

Attempts were made from time to time to republish the customs of the kingdom generally in a systematic and authorized form. Thus Charles VII., after expelling the English from France, published a general *Ordonnance* in 1453, dated from Montil-les-Tours, the 123rd article of which provided that all the customs of each part of the country should be written out by qualified persons, examined and authorized by the Grand Council and by Parliament, and that, thus systematized and approved, they should have the exclusive force of law. It is supposed by the best authorities on the subject that the idea was to have a common code for all the customary provinces; and that such an idea was not an anachronism is clear from the assertion of Philippe de Comines that Louis XI. wished much that there should be but one custom, one weight, and one measure, in his kingdom, and that all the customs should be collected and published in French in a single book.

The authoritative collections of local customs were numerous, and it is said that as many as sixty might be counted of the principal bodies of customs, differing much from one another, or, if the smaller collections and those of the low countries are included, as many as 285.

The positive legislation of the country was conducted

by the king, through his ordinances, and in more or less dependence on the Parliaments. These Parliaments were at first, no doubt, like the English Parliament—real legislative assemblies, which shared with the king the government of the country—though they were never of a really representative character in a popular sense.

It was in the troubles of Charles VI.'s reign, that the lords who used to compose the Parliaments abandoned their place in order to protect their own homes, and the professional lawyers who had been wont to attend for the purpose of giving technical advice gradually took the place of the absenting lords. It is said that the consequence of this change was the gradual conversion of the Parliament into a strictly legislative, as opposed to a political assembly, and that their influence was increasingly felt in the making of law.

The right of registering the royal decrees was one of the means through which the legislative faculty was exercised. It is said * that Jean de Montluc, a Clerk of the Parliament of Paris, under Philip the Fair, made a collection of royal decrees for his own use, and this suggested the convenience of keeping a record of all the royal decrees for the purpose of their being easily consulted. The practice consequently grew up of depositing at the office of the Clerk of the Parliament all decrees and ordinances. This gradually became an indispensable formality. It is impossible, however, to fix the date of the first registration, owing to the casual destruction of the documents, especially by a fire in the palace in 1618. The constitutional history of France abounds with remonstrances made by the Parliament of Paris, and the form these remonstrances took was that of delays in registering the decrees of the king. When the king attended in person and peremptorily commanded the registration of a decree, he was said to hold a *lit de justice.*

A great part of the civil and commercial legislation

* "Histoire du Parlement de Paris," par M. l'Abbé Beq . . . Amsterdam, 1750.

of the country during the reigns of Louis XIV., Louis XV., and Louis XVI. was effected by comprehensive *Ordonnances* of the nature of partial codes. The true spirit of codification which prevailed in some of this legislation may be gathered from the following preamble to the *Ordonnance* on "Water and Woods" of 1669. "In order to carry out so useful and necessary a work, we thought ourselves bound in justice to procure a report of all old and new ordinances relative to the subject, so that, comparing them with the views transmitted to us from the provinces, we may out of the whole form a body of clear, precise, and certain laws, which shall dissipate all the obscurity of those which went before." It need scarcely be said that, in the preparation of these ordinances, the lawyers, trained in Roman law at the best law schools and familiar with Roman law language, had a prominent part.

The writings and commentaries of Pothier (who died in 1772) and others on the text of the *Corpus Juris*, co-operating with the persistent tendency to systematize the customs, favoured the preparation of a general national code, which should find a meeting place for the law of the customary and of the Roman-law provinces. The following decrees of the National Assembly of 1791 (25th and 30th August) are the real starting-point of the code which has been accidentally only associated with the name of Napoléon :—

"Acts 19, 20, 21. The civil laws shall be revised and reformed by the Legislature; and there shall be a general code of laws, simple, clear, adapted to the constitution.

"The code of civil procedure shall be constantly amended, so that the law be made more simple, expeditious, and inexpensive.

"The Penal Code shall be constantly amended, so that penalties be apportioned to offences, care being taken that they be moderate, and sight not being lost of the maxim which forms part of the Declaration of the Rights of Man, that the laws must only assign punishments so far as they are strictly and obviously necessary."

(2) THE CIVIL LAW IN ENGLAND.

During the period of the Roman occupation of Britain, there is every reason to suppose that, in spite of the distance from the capital, the law of the Empire took deep root; and, in any case, Britain is closely connected with the most illustrious of all names in Roman law, that of Papinian, of whom Cujas speaks as being the first of all jurists who have been or will be, whom none has ever excelled or will excel in the knowledge of law. Papinian was a Prætorian Prefect at York, under Severus; and it is a tradition among good authorities that he had Ulpian and Paulus for his assessors. Severus himself was in Britain with his sons Caracalla and Geta, and died at York in A.D. 222. In the last year of his reign he promulgated the law (L. 1, C. (iii. 32)), which enabled a person to make acquisitions by means of another's slave in his *bonâ fide* possession, but not by one in his *malâ fide* possession. Ulpian, too (L. 2, § 4, D. (xxviii. 6)), says that the law forbidding a person to nominate his son's heirs before nominating his own was due to an imperial rescript sent to Virius Luppus, the "Præses" of Britain. Even the British writer Gildas, shortly after B.C. 511, when the Romans had retreated, speaks of the way in which Roman institutions had penetrated Britain, to the extent that Britain was called "Romania."

Nevertheless, it is remarkable that, from the time of the withdrawal of the Romans to the complete settlement of the Normans, a period of some seven hundred years, there is scarcely to be found any token of the influence or of the knowledge of Roman law. The Roman influence seems to have expired suddenly in Britain, in a way which is not witnessed in those countries where the Roman government was merely displaced by the governments of the barbarians. There was no secondary influence of the Theodosian Code and of the great jurists of the Antonine age through Barbarian Codes; and the diffusion of the Justinian compilation in the sixth century could not extend to Britain. Thus,

though it is probable that Roman ideas and institutions really survived in one form or another to an extent which has not yet been traced, yet distinct allusions to Roman law are, throughout the whole period, as rare as possible,—and this, too, though the Anglo-Saxon legislation was extensive and systematic and has been well preserved,—as also have been ample specimens of Anglo-Saxon charters, Wills, and conveyances generally. In the laws (written in Latin) of the Welsh king Howel Dha (A.D. 940), there is indeed a mention, with approval, of the Roman requirement of two witnesses in most cases, and of the exceptions to this rule.

The Norman Conquest had an indirect effect in subsequently establishing Roman law as one of the sources of the English law, though it was not till the reign of Stephen that the study of Roman law was actively prosecuted. William the Conqueror, or his sons, (1) established the central courts of justice in competition with the county courts and other local courts; (2) separated the ecclesiastical courts from the civil; and (3) required all legal proceedings to be in Norman—as they continued to be for more than two centuries.

The result of the first of these changes was to import into the administration of justice the most highly trained and educated men of the day, and this usually meant men with a clerical education, and who had imbibed at the Universities, which were springing up in England as well as in Italy and France, a classical spirit and a familiarity with Latin forms of expression. These forms of expression were, in legal matters, necessarily founded on the language of the Roman law. The result of the second change was to give free course to the influence of the civil law and the canon law in the ecclesiastical courts, without any check from the customary or common law of England. The result of the third change was to unseat the old Saxon and purely native law and to favour legal change and the usurpations of the judges and practitioners who were most or alone familiarized with the new language.

The aggregate consequences of these and other parallel

changes begin, in the second century after the conquest, to make themselves distinctly felt in the wide influence attained by Roman law, an influence which, in spite of momentary opposition and deep-rooted hostility in political quarters, maintained and extended itself for two centuries. The mode in which Roman law, in its principles, ideas, and language, entered into the substance of the national law during this fusion of all things in the new England has been duly estimated only by a few, and among these few most notably by Selden in his learned "Dissertation on Fleta," and by Arthur Duck in his invaluable treatise on the "Use and Authority of the Civil Law of the Romans in the Dominions of Christendom" (1689).

The earliest authority as to the complete recognition in England of the sources of the Roman law, anterior to the compilation of Justinian, is William of Malmesbury, writing between A.D. 1125 and his death in A.D. 1142, in the reign of Stephen. Selden ("Dissert." cap. vii.) cites, from the manuscript in his own possession of an historical work of William of Malmesbury, contemporary with that author, the passage of which the following is an English translation :—

"Now we have taken care not to omit what we could find about the princes of Italy and Rome. It seems suitable to set forth the laws of the Romans. Not those which Justinian made. For that would be a great work and labour. But those which Theodosius the Less, the son of Arcadius, collected from the times of Constantine onward under the title of each emperor." The passage then goes on to allude to sundry collections of Novells attached to the Theodosian Code, and adds, "But since there are some things in the laws of the emperors which are obscure, for their full comprehension we have added the books of the Institutes of Gaius and Paulus." Selden adds that the manuscript purports then to give the text of all these laws and treatises, but is so mutilated that sometimes a single title takes the place of a whole book, and the work is full of gaps and corrupt texts, though of a kind to admit of restitution.

The next light thrown upon the history of Roman law in England is supplied by a writer a little later than William of Malmesbury, that is, John of Salisbury, who died in 1182, under Henry II. He gives an account in his *Policraticus* not only of the introduction of the civil law into England, but of the opposition to it in Stephen's time. He says, "Others I have seen who devote law books to the fire, and do not hesitate to destroy them if they, or any canons, come into their hands. In King Stephen's time the Roman laws, which the household of the reverend father Theobald had brought into Britain, were expelled the kingdom. A royal ordinance (*edictum*) forbade any one to retain the books in his possession, and our Vacarius had silence imposed upon him; but by the help of God (*Deo faciente*) so much the more the law grew in strength as impiety strove to weaken it."

Vacarius, here alluded to, was a professor at Oxford, and it has already been mentioned that he published an abbreviation of the Code and Digest in nine books for the use of poor students, who might not be able to obtain copies of the originals for themselves. There is reason to suppose he first set the example, afterwards followed by Placentinus and Azo, of publishing a compendium or *summa* of the whole known Roman law in a systematic form. If this be so, it is interesting, because Bracton often copies Azo's *summa* word for word, and it would be gratifying to trace back this work to a parentage at Oxford.

The history of Theobald, Archbishop of Canterbury, in connexion with Roman law is worth dwelling upon. He had been originally sent by Thomas à Becket to Bologna to study the civil law. On his return he was made doctor of laws at Oxford; and he was afterwards sent to Pope Celestine, to invite him to recall the legatine authority conceded to Henry of Winchester. The fact that Theobald was in such favour at court and made Archbishop of Canterbury by Henry, in spite of his known concern for the progress of the civil law, indicates that the ordinance against that law promulgated by Stephen was a mere political and personal move, proceeding from the casual

animosity in influential quarters to which Theobald's mission to the Pope and known ecclesiastical and national proclivities had given rise.

There are many literary indications that Stephen's ordinance had hardly even a momentary effect in arresting the progress of civil law studies, and those interested in rival studies were loud in their complaints against it. Thus Giraldus of Oxford, (Girald. Cambrensis in præfat, *ab* lib. i. distinct) relates how a clerk, Martinus, blamed those of Oxford in a public meeting "because the imperial laws suffocated all other sciences." Daniel Morleus, again (see Duck, lib. xi. cap. 8), reports that on his return to Oxford from abroad he found "the study of law had so flourished that Aristotle and Plato were quite forgotten for Titius and Seius, and that the traditions of Ulpian were represented in golden letters." Roger Bacon similarly complains that the bishops neglected the study of theology, and that the quibbles of law fouled philosophy (*quod cavillationes juris defœdarent philosophiam*).

On the accession of Henry II., owing, no doubt, to the recovered influence of Theobald, Roman law seems for a time to have had free course; and Peter, Archdeacon of Bath and chancellor to the Archbishop of Canterbury, describes how, in the archbishop's house after prayer and breakfast, the most learned men of the kingdom took part in discussing points of law, and how all "knotty questions" in the kingdom were referred to them, and each gave his opinion in turn in an informal manner.

In the reigns of Richard I. and John, Giraldus Cambrensis cites Justinian's Institutes as received authorities, quoting the words of the preface to the Institutes: "*In elementorum libro scriptum in capite reperies, imperatoriam magistatem non solum annis decoratam sed et legibus decet esse ornatam.*" The "Vision" of the monk of Evesham, in 1196, is another proof of the familiarity with Roman law at the time. In the third penal department of purgatory is found a clerk well known to the monk. Selden gives from an ancient manuscript in his possession the following full transcript of the passage in the

Vision :—"In his time he was held to be the most skilled of those who are called legists and decretists, whereby he had instructed a vast number of hearers in the schools, and had conciliated to himself the familiar acquaintance of the great." Selden rightly argues that this shows that in Richard I.'s time the opposition between the legists, who taught the civil law, and the decretists, who taught the canon law, and the extent of the legal teaching, were familiar enough to be the topics of a popular satire.

About the same time Walter Mapezius wrote his metrical sermon on the day of judgment, some lines of which are worth citing, as showing conclusively that the Roman law sources and practice were as familiar to the educated public as the common law, if not more so. The lines, as cited in the original Latin by Selden, are as follows. Below, in the note, is a paraphrastic translation.

"Cogitate, Divites, qui vel quales estis,
Quid in hoc judicio facere potestis.
Tunc non erit aliquis locus hic Digestis :
Idem erit Deus hic Judex, Autor, Testis,
Judicabit judices Judex generalis.
Nil ibi proderit dignitas Regalis.
Apud nostros judices jura subvertuntur
Et qui legem faciunt lege non utuntur." *

Selden further gives an important interpretation of the celebrated expression *legem terræ*, which occurs in the 29th chapter of Magna Charta. He says that John of Salisbury, writing in the time of Henry II., gives an account of the oath which judges had to take. The form of the oath taken by all judges, ecclesiastical as well as civil, has been preserved in the judicial annals of Henry III.'s reign, and it included the words, "*Se judicaturos secundum legem et*

* "Bethink you, O ye rich men, what answer you must give,
When the Judge is come to order who shall die and who shall live.
The edict then is silent, the Digest is unknown,
God is both Judge and Jury and Advocate alone :
Before the universal Judge all other judges tremble ;
Royal prerogative itself its glory will dissemble.
For here the judge who tries the right is he who overturns it,
And he who did enact the law the very one who spurns it."

consuetudinem regni; and "*bonâ fide procuraturos quod magnus sicut parvus judicabitur secundum legem et consuetudinem regni.*" Thus the "*lex*" and "*consuetudo*" *regni* were opposed to the *lex Cæsarea* in the current administrative language of the day. There can be little doubt, then, that when, according to Magna Charta, it is provided that trials in certain cases shall be *per parium judicium vel per legem terræ*, it is intended distinctly to supersede the procedure and the rules of the Roman law by those of the customary or common law.

In Henry III.'s reign, and succeeding reigns, the same symptoms, which reveal the growing preference for the common law as compared with the civil, demonstrate also the extent to which the civil law had been previously practised and taught. Thus, there is preserved among the public records an ordinance of Henry III.,* by which the mayor and corporation of London are commanded to prevent and suppress the professional teaching of "the laws" in the city of London. Selden argues that these laws can only have been the civil or canon laws. There is also mentioned in the contemporary records a John of Lessington, or Lexington, a chief justice, who is described as *vir providus et discretus, et in utroque jure, canonico scilicet et civili, peritus.*

Even so late as the reign of Edward II. it is possible to show that the language, rules, and methods of reasoning of the civil law were quite familiar in the common law courts. Selden cites a contemporary MS. of Richard of Winchedon, which refers to the civil law notion of a "civil death" as opposed to a natural death, just as in the previous reign of Edward I., an eminent jurist, called Odofred,† says it was a matter of controversy in his time whether a prince or a bishop, if he lost his official dignity, could be said to be *capite minui.* In the fifth year of the same reign the law reports preserve the record of a direct citation from the Digest (L. 14, D. (l. xvii.) *de diversis regulis juris*) to prove that when a promise is made without a date for the per-

* Rot. Clau. 19, Henry III. *an.* 1234. *Vide* Selden.

† Selden "Ad Fletam Dissertatio," cap. viii. § 3.

formance its performance can be claimed at once. Selden gives other like instances, which quite establish that, so late as the reign of Edward I. and Edward II., the Roman law authorities were habitually cited in the common law courts and relied upon by legal writers, not as illustrative and secondary testimonies, as at present, but as primary and as practically conclusive.

The steps by which, soon after this time, during the reign of Edward III., Roman law gradually lost its direct authority in England are interesting to notice, and are traced with precision by Selden. The gradual diminution of the attention bestowed on Roman law is marked by the professional ignorance of the subject, which becomes increasingly manifested. Thus it is reported in a case in which the Abbot of Tor was sued, because he had, contrary to a royal prohibition, sued in the pontifical court at Avignon a certain prior for building an oratory *contra inhibitionem novi operis*, that the counsel Skipworth, an eminent serjeant, argued that these Latin words had no meaning (*in ceux parolx "contra inhibitionem novi operis" ny ad pas entendement*). The judge, Shardus, seemed to know something more about it. Indeed, the proceeding alluded to (*de novi operis nuntiatione*) belongs equally to the Roman and the Canon law; and Justice Shardus simply says, "we have no concern with their law," and obliges the counsel to pass on to other points.

In another century, that is, in the reign of Henry VI., the common law had obtained a complete victory over the Roman law, which only survived in the court of Chancery and in a few other courts, always held to be in certain respects subordinated to the common law courts. Chief Justice Fortescue, in his "De Laudibus Legum Angliæ,"* makes the comparison between the rules of the civil and of the common law a favourite text for his lectures to the heir apparent; and he invariably, and often unjustly, speaks of the Roman law with disapprobation, in order to extol the superiority of the laws of England.

* See the Cambridge edition, 1825, with the translation of 1775 and notes by my father.

In the seventh chapter the young prince is represented as debating with himself and consulting his teacher as to whether "to apply himself to the study of the laws of England, or the civil laws which are so famous throughout the universe: for a kingdom ought to be governed by the best of laws." Fortescue makes short work of this question by saying that the prince has practically no choice. "A king of England cannot, at his pleasure, make any alterations in the laws of the land, for the nature of his government is not only regal but political." He explains "political" to mean, that the king can "neither make any alteration or change in the laws of the realm, without the consent of the subjects, nor burden them against their wills with strange impositions." Before comparing the two systems of law together in their concrete institutions, such as procedure, trial by jury, evidence, and judicial organization, the Chief Justice then comments on the nature of the relationship between the common and the civil law. He says (chapter xix.) "where they agree, they are equally praiseworthy; but in cases where they differ, the law which is the most excellent in its kind, after mature consideration, will evidently appear so to be." He introduces these remarks by saying, "I remember a saying of yours, my prince, that comparisons are odious (*comparationes odiosæ reputantur*); and therefore I am not very fond of making them: you will see better reasons whereby to form your judgment, and which of the two laws may deserve the preference, by considering wherein they differ, than by taking my opinion in the matter upon trust."

Having examined the internal proofs of the influence exercised by Roman law in England during the two or three centuries succeeding the Norman Conquest, it is necessary to notice a class of legal treatises of a systematic kind which appeared during this period, and which illustrate in a remarkable way the mode in which Roman law was once far more closely implicated with the substance and framework of the English common law than it has ever been since. The treatises are those known under the name

of their authors, Glanville, Bracton, Thornton, the writer of "Fleta," and Britton; and the period covered by them is that between A.D. 1190 and A.D. 1297—about a hundred years.

The treatise usually attributed to Ranulph de Glanville, Great Justiciary of Henry II., and dated shortly anterior to A.D. 1190, is styled *Tractatus de legibus et consuetudinibus regni Angliæ.* The writer, in his preface, confesses it to be out of his power to embody in writing the whole law and customs of the land (*cum propter scribentium ignorantiam cum propter earum multitudinam confusam*), and, in fact, he confines himself to the practice of the *curia regis* and to the principles of law most frequently arising in that court.

It was some seventy years later, about the year A.D. 1259, towards the end of Henry III.'s reign, that Bracton published his great book, with the same title as that of his predecessor, Glanville. In the interval between the dates of the two publications, the Roman law had been introduced and vigorously studied, under the patronage of Theobald and the Oxford school; the new procedure by "assize" actions had taken root and given an impulse to litigation; the localized administration of the Pre-Norman period had been dissolving away before the centralized feudal institutions; and the way was prepared for a systematic exhibition of the whole law in its organic entirety. This was provided for by the work of Bracton, and it is of the utmost importance to observe that a Roman-law method of distribution and Roman-law ideas and language prevail throughout,—not indeed to the complete suppression of the customary law, but so as largely to subordinate and control it. The leading divisions of Bracton's work are those of the Institutes of Gaius' and Justinian, that is, persons, things, and actions. His definitions are often *verbatim* those of the *Corpus Juris.* Thus, an obligation is a *juris vinculum quo necessitate adstringimur ad aliquid dandum vel faciendum.* The four sources assigned for the origin of obligations are "contract, quasi-contract, delict, and quasi-delict" (Bracton, 99). The definition of theft, which has had lasting efficacy in

English law, is that it is *contrectatio rei alienæ fraudulenta cum animo furandi*, a composite sentence made up of expressions in D. (xlvii. 2) *de furtis*.

The amount of the Roman-law element in Bracton's treatises could only be properly expounded by collecting all the passages which are *verbatim* transcripts from the Roman-law sources. This has been done by Professor Güterbock, of Kœnigsberg, in a work which is styled a "Contribution to the History of the Roman Law in the Middle Ages," and translated in America by Mr. Brinton Coxe. The repute and influence of Bracton's treatise can best be estimated by noticing the mode in which it was copied, abridged, and turned to literary account within the succeeding century by other writers of eminence, whose works have descended to the present times.

Thus, the work of Gilbert de Thornton, chief justice in Edward I.'s reign, professes to be a "*Summa*" or abridgment—the name given to the work on the Roman law by Azo (who died at Bologna in 1230), from which Bracton largely borrowed—of Bracton's work. The course of Bracton's treatise is followed, though there are some differences in the nominal distribution, and the law of dower and that of inheritance are postponed to the end.

The anonymous work known as "Fleta," from the Fleet Prison, where it purports in the preface to have been composed, seems from internal evidence to have been written a little after A.D. 1292.* In this work there are no express citations from the text of the *Corpus Juris*, but Bracton's citations are sometimes reproduced with general references, such as *ad hoc facit lex imperatoria* ("Fleta," i. 38, § 15), *quia omnino hoc prohibetur in lege* ("Fleta," iii. 3, § 12). In one passage the Institutes are directly referred to, *secundum quod Institutis legitur* ("Fleta. iii." 2, § 12). The Roman-law passages extracted from Bracton are almost always repeated word for word. Professor Güterbock (p. 70) notices that he has found additions of Roman-law matter in the chapter *de dotis constitutione*, which are not due to Bracton, but to the author's own knowledge, or to some

* Güterbock, p. 71. Selden, "Ad Fletam Dissert.," x. § 1.

other source.* The arrangement of "Fleta" agrees only partially with that of Bracton's work.

Britton's work is the last of the series. It is of the nature of a compendium of Bracton's work, though the verbal connection between the two treatises is not so obvious as in "Fleta." It has been alleged that the name Britton is, in fact, identical with that of Bracton, just as the name of Justinian is attached to Novells of a much later date because they were bound up with his (Selden, "*Ad Flet. Dissert.*," ii. 3).

The most prominent and unmistakable modes in which the memory and practice of Roman law have been preserved in England to modern times are found in the procedure of still subsisting, or of recently obsolete, courts of justice. To this class of courts belong the court of Chancery, the court of Chivalry, the Admiralty court, and the Ecclesiastical courts.

It is well known that the court of Chancery took its rise from the jurisdiction gradually acquired by the king's Chancellor, who for a long period was a priest, and trained rather in the civil and canon than in the common law, in the course of granting relief on petitions founded on alleged denial of justice in the courts of common law. The proceedings on the petition, so far as they were not summary, naturally assumed the form of a trial on a *libellus*, with written depositions of the kind in force under Justinian's reformed legislation. The witnesses were not generally produced in court; there was no jury; and there were various processes of a searching but somewhat imperious kind for discovering the truth and extorting information or evidence from reluctant witnesses. At the same time the judges claimed for themselves a considerable latitude of discretion for the purpose of tracing and defeat-

* The author of the present treatise has in his possession an old copy of Selden's edition of "Fleta," dated 1685, in which the passages in this chapter from the Digest directly and from Bracton are severally indicated in MS. by marginal references. [Burnt in Alexandria, July, 1882.]

ing every kind of fraud and *mala fides.* The summary jurisdiction of the interdict was also reproduced in the "injunction."

The court of Chivalry is treated as still existing by Fortescue in Henry VI.'s reign, and has never been abolished; though when the office of the Lord High Constable (joint president of it with the Earl Marshal) became forfeited through the attainder of the Duke of Buckingham in the reign of Henry VIII., the office was deemed too influential to be entrusted to a subject. Cardinal Wolsey desired to fill it, but was thwarted by Sir Thomas More. The statute Henry IV. c. 14 contains a provision, the effect of which is to prevent the determination of any matter in the court of Chivalry which could be tried at common law. The proper function of the court was to try cases which arose in other countries. It belonged especially to the time when the English Crown had large continental possessions. Then, in Edward III.'s reign, a fiction was devised to make matters arising abroad cognizable by a jury from an English county. Then, again, in Henry VIII.'s reign, a statute was passed to facilitate the trial of treasons committed beyond sea. "Its later business" (says Sir Matthew Hale) "was to adjust the rights of armorial ensigns, bearings, crests, supporters, pensions, and also rights of place and precedence, subject to any royal patent or act of Parliament. Blackstone says of the court of Chivalry or court Military that "the proceedings were by petition in a summary way; and the trial was not by jury, but by witnesses or by combat, and this was an appeal to the sovereign in person." There is no doubt that the extra-territorial jurisdiction this court exercised explains the grounds of the preference for civil law over common law procedure.

For similar reasons the high court of Admiralty (except so far as its procedure has been recently regulated and modified by statute) has always proceeded by methods more akin to the civil procedure of Justinian's time than to the jury-trial known to the common law. It is said (Amos' "Fortescue," p. 114) that the first extant case in

our law relating to marine jurisdiction is in the time of Edward I.; but the judicial power of the admiral does not appear to have excited the attention of the legislature until the reign of Rich. II., when the statute (13 Rich. II., stat. 1. cap. 5) directed that the "admiral" and his deputy should not meddle with anything save such as are done upon the sea. Not only is the procedure in the court of Admiralty, and especially in courts of Prize, still a close transcript of the mode of trial pursued under Justinian's later legislation, but the high court of Admiralty has always held itself entitled to recognize the validity of such bodies of law as the Rhodian law (of which clauses are preserved in the Digest) and the laws of Oleron* recognized by the chief naval countries in the Middle Ages. Luders, in his tract on the laws of Oleron, notices a petition of the Commons in the reign of Henry IV. against the encroaching jurisdiction of the Admiralty courts, and they enumerate among their grievances "que les ditz admiralles usent leur leyes tant foulement per la ley de Oleron et anciens leyes de la mer." They pray that they may be confined in their trial of matters of contract to such only as arose upon the sea.

It is needless to say that the Ecclesiastical courts and the University courts have preserved more faithfully than any others the procedure and traditions of imperial Rome. This has been due to the influence of the Canon law and to the foreign education of those who have presided in them. It was the like civil law education of the advocates who pleaded in the courts of Admiralty and in the Ecclesiastical courts, which curiously combined them together under the presidency of the same judge and in the same chamber. They have been alike, too, in the prejudice their procedure has excited at the hands of the common law judges and practitioners (see Amos' notes to "Fortescue," p. 114); and in the perennial struggle they have maintained with the common law courts of Westminster Hall. *Nolumus leges Angliæ mutari* was not an outcry of primitive conservatism, but a public repudia-

* See Luders' Tract.

tion of Canon law or Civil law rules as applicable to succession and marriage.

The cases of France and England have been chosen for the purpose of historically exhibiting, on the one hand, the largest influence of Roman law on modern law; and, on the other hand, the most restricted influence. For the present purpose it has not been thought necessary to dwell upon some topics relating to the fresh development of Roman law in modern Europe which are of the highest historical interest. To such an inquiry would belong an account of the progress of Roman law in the States into which the Holy Roman Empire became gradually dissolved, such especially as Holland, Switzerland, and modern Germany. The influence of Roman law in Holland is especially memorable from the great text-book composed by Grotius in the year A.D. 1620, and which has been translated into English* for the use of practitioners in those British Colonies,—such as Ceylon, the Cape, and British Guiana,—in which the laws of Holland and Roman law still have some force. The work is styled "Introduction to Dutch Jurisprudence," and in arrangement, terminology, and legal notions, follows closely the system of Justinian's Institutes as amplified by the Digest. The work was composed during the imprisonment of its author in the castle of Louvestein, after Barneveldt's execution. Van der Keessel, who, at the close of the last century, published his "Theses" as a supplement to Grotius, and in elucidation of controverted points of law, says that "it contains, in the smallest space, the greatest quantity of matter, digested in a method most accurate, and most clear and explanatory; for by referring, on every occasion, to the laws of Nature and to civil institutions, it exhibits the admirable harmony and analogy of laws, and presents a model deserving the attention and study of every professor of jurisprudence."

In the same way, the indirect influence of the univers-

* By Charles Herbert. John Van Voorst, 1845.

ality of the European law of nations, the incessant use of it, and the systematic treatises referred by such men as Balthazar Ayala, Albericus Gentilis, Grotius, and Puffendorf, have had the most distinct influence on the preservation of the memory of Roman law. So soon as the moral and political ideas, which lay at the root of the Law of Nations, became matter of distinct legal consciousness, the language in which they were cast, and the language of treatises and diplomacy, was the language of Roman law. The Latin, French, Italian, and Spanish tongues all tended to preserve the ancient law terms with much of their ancient meanings, and at this day Roman law language is the recognized instrument of communication for purposes of legal international transactions. A reference to Grotius "De Jure belli et pacis," and a comparison of it with the most modern treatises, is sufficient to establish the permanence of the Roman law as an international legal language. Sir Henry S. Maine, in his essay on Roman law in the "Cambridge Essays," pointed out the political disadvantage which English diplomacy has sometimes suffered from the ignorance of Roman law.

§ 5.—*Recent Codification on Principles of the Roman Law.*

(1) Codification in Germany.
(2) Codification in France and on the continent of Europe and in Egypt.
(3) Codification in America.

(1) Codification in Germany.

In tracing the progress of Roman law down to the present times, and in estimating the amount of its present influence, it is necessary to take into account the large number of modern codes which have been constructed on the lines supplied by Justinian's compilations, and which have largely incorporated, and so republished, the ideas, prin-

ciples, and terminology of Roman law. Without dwelling on all the codes of this nature,—of which it is said the Danish (dated 1680),* and the Swedish (dated 1734), are some of the oldest—the Prussian code of Frederick the Great, the French codes, and the code of the State of Louisiana, deserve especial mention and some description.

The code of Frederick the Great, published in 1751, has about it much of the grandiloquence of Justinian, and assumes to be based on certain and reasonable principles having for their foundation Roman law. But, says the king (introduction, § 10), "We have got rid of the subtleties of the Roman laws and all that was not applicable to the constitution of our States." Advocates are forbidden henceforward (part i., bk. i., Tit. iii., § 5) to cite the authority of Roman law, or that of any doctor whatever; and judges are forbidden to have any regard to it in their decisions. Nevertheless, the memories and notions of Roman law reappear at every point in the body of the code. Women, it is said (part ii., bk. i., Tit. iv., § 3) are to have the benefit of the *Senatus consultum Velleianum*, which instantly introduced, as a necessity, a mass of Roman law learning. The *patria potestas*, as founded on a legal marriage; the *tutela* and *curatela*, adoption and *arrogatio;* marriage and dower; are all conceived in the form known to Roman law, and proceed on an assumed understanding of its principles. The Prussian *Landrecht* and the code of the German Empire have since, under the influences of the very erudite German law school, amplified these principles in all their modern applications; and as these codes, so far from being influenced by the Code Napoléon, have rather resented even an analogical approach to it, they furnish an independent testimony to the modern vitality of Roman law.

* See Bentham's Complete "Body of Legislation," ch. xxxi.

(2) Codification in France and on the Continent of Europe, and in Egypt.

In the account which has already been given of the history of Roman law in France, it has been seen that the Roman law at all times profoundly influenced the French law in all the provinces, even those subjected to what was called "customary law," and that the systematization of the law was a favourite project of the French kings. The works of Pothier (born in 1699), which consisted of a rearranged and annotated edition of the Digest and of logically distributed treatises on the chief topics of civil and commercial law from a Roman law standpoint, tended to prepare the way for a true code of French law on a Roman-law basis. The atrocious severity of the criminal law, and the administrative inconvenience of a multiplicity of systems, also tended in the same direction of enforcing the necessity of comprehensive legal reform. The promotion of such a reform was among the first aspirations of the revolutionary leaders, as appears from the following decrees of the National Assembly, dated 25th and 30th August, 1791.

"The civil laws shall be revised and reformed by the Legislature; and there shall be made a general code of laws, simple, clear, appropriate to the constitution. The code of civil procedure shall be constantly amended, so that it be made more simple, expeditious, and inexpensive. The penal code shall be constantly amended, so that penalties shall be proportioned to offences; care being taken that they be moderate, and that maxim being kept in view which forms part of the Declaration of the Rights of Man, that 'the law can only institute punishments strictly and obviously necessary.'"

The Convention (1792–1795) prepared, with the help of Cambacères, a *projet* of a Code, and another *projet* was prepared in 1795, with the help of Jacqueminot by the Council of Five Hundred.

To Napoleon belongs the credit, not, as is often supposed, of originating the idea of a comprehensive French

Code, but that of actually decreeing that the work should be done.

To understand how the task was originally set about, under the consular government of Napoleon, it must be remembered that the original constitution of the Consulate, which succeeded that of the Directory, comprised the following elements, legislative and executive :—

Three Consuls, one pre-eminent over the other two.

A Council of State, charged with the task of suggesting and preparing legislative measures.

A "Tribunate" (of one hundred members over twenty-five years of age, and one-fifth of whom were renewed every year), whose task was to discuss among themselves measures of government and argue them in the Legislative Body.

The Legislative Body, which only listened and voted.

The Conservative Senate.

The Civil Code was the first portion of the work to be done, and it was, as it were, built up out of a series of measures or *projets*, each of which was separately discussed and passed, after being submitted to the Court of Cassation and to the different courts of appeal throughout the country, and after their comments and criticisms had been considered. The chief discussions of the letter of the code took place in the Council of State, and in the presence of the Legislative Body, through the arguments and counter-arguments of the Tribunate and the professional supporters of the measure as approved in the Council of State. The report of these discussions is preserved, and is, of course, of the highest interest. After a time the Tribunate was suppressed, apparently from the obstacles to the complete carrying out of his own will which Napoleon encountered from it.

Napoleon himself always took the most active part and interest in the process of codification, sometimes indeed from selfish concern, as in the case of the law of marriage and divorce, which affected himself. He often manifested the keenest interest in the progress of the work, even in the midst of a distant campaign.

As a specimen of the difficulty which was encountered in reconciling the rules prevalent in Roman-law provinces with those prevalent in "customary law" provinces, the case of marriage may be selected in which the dotal *régime* and the system of community of goods came into direct competition. They were both allowed to stand, if the parties chose, but in default of expressed intention the system of community was held to be presumed.

The general distribution of the civil code follows that of Justinian's Institutes and Pothier's treatises to an almost servile extent. Inasmuch as the code not only obtained a lasting footing in many of the European dominions, especially the Rhine provinces, which formed part of Napoleon's Empire, and has since been the constant model on which most European codes have been constructed, it is obvious that it has become one of the chief avenues for handing down Roman law to a new age.

One of the latest extensions of Roman law through the medium of the type supplied by the French codes, is the system of codes which came into force in the mixed international tribunals of Egypt, in 1876. These are, in fact, curt abbreviations of the Code Civil and the Code de Commerce, the Roman law arrangement, method, and terminology being, of course, prevalent throughout. The new codes for the remodelled Native Tribunals are being framed after the same type, and the result will be a fresh meeting point of the Roman law of the West with the Roman law element in the Mohammedan law of the East.

(3) Codification in the United States of America.

One of the most notable adaptations of Roman law to the uses of a progressive modern State is exhibited in the Code of Louisiana. The present civil code of Louisiana is probably the most complete code in existence, originally composed in the English language, and based on the principles and terminology of the Roman law. Louisiana was ceded by France to Spain by the treaty of 1762. Even when the territory was ceded to the United States Govern-

ment, French law (based on the *Coutumes de Paris*) and Spanish law prevailed in suits between individual persons.

In 1806, the Legislative Council of the territory of Orleans appointed two able lawyers to compile and prepare a civil code for the use of the territory. The result of their labours, purporting to be a "digest of the civil laws now in force in the territory of Orleans, with alterations and amendments adapted to the present system of government," was reported and adopted in 1808. The code was, in fact, a republication of so much as was not obsolete in the Spanish and French law, and generally followed the Justinian system, arrangement, and terminology, as well as the leading principles applicable to all the leading departments of the law.

A new and reformed code, which is, in fact, the one now in force, was published in 1824. It had the advantage of the experience derived from the precedent and operation of the French codes. It was entrusted to Mr. Derbigny, Mr. Livingston, and Mr. Moreau Lislet, and is, in many respects, a work of the highest interest.

The "repealing clause" is an index to the character and object of this code. It is as follows:—"From and after the promulgation of this code, the Spanish, Roman, and French laws which were in force when Louisiana was ceded to the United States, and the acts of the Legislative Council of the Legislature of the territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case for which it has been specially provided in this code, and they shall not be invoked as laws, even under the pretext that these provisions are not contrary or repugnant to that code."

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